Supreme Court, U.S.
FILED

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No.

IN THE

SUPREME COURT OF THE UNITED STATES

PAUL ENRIGHT,

Petitioner,

v.

SOLAR TURBINES INCORPORATED,

Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of
Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the EEOC Interpretive Guidance on the *Definition of the Term "Disability"* February 2000, is valid and should be followed in determining if an individual is substantially limited in the ability to engage in work under the Americans With Disabilities Act of 1990 (ADA), 42 U.S.C. §§ 12101, et. seq., and if so, whether the Ninth Circuit properly applied this guidance.

2. Whether the Federal Rule of Evidence 702 was properly applied in determining that Mr. Enright's vocational rehabilitation counselor did not qualify as an expert witness, despite the fact that he has previously testified as a vocational expert, and does his report which concluded that Mr. Enright was precluded from approximately 29% of all jobs in the *Dictionary of Occupational Titles* (DOT) due to his impairment, create a triable issue of material fact as to whether Mr. Enright is disabled under the ADA?

3. Whether an arbitrator's decision under a Collective Bargaining Agreement is admissible evidence in an ADA case, where the arbitrator exceeded the scope of submission by ruling on Petitioner's federal statutory rights under the ADA, and where the arbitrator was not an impartial decisionmaker because he was exclusively chosen by Petitioner's adversaries.

LIST OF PARTIES

All parties appear in the caption of the case on the cover page. Petitioner is Paul Enright. Respondent is Solar Turbines Incorporated.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Paul Enright, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The decision of the United States Court of Appeals for the Ninth Circuit (App., *infra*, 3a-4a) is unreported. The order granting summary judgment by the United States District Court, Southern District of California (App., *infra*, 5a-16a) is unreported. The Opinion of the Arbitrator under the Collective Bargaining Agreement between Solar Turbines and the Union (App., *infra*, 17a-30a) is unreported.

JURISDICTION

The decision of the United States Court of Appeals for the Ninth Circuit was entered on September 19, 2002. App., *infra*, 3a-4a. Petitioner filed a timely petition for rehearing and rehearing en banc on October 9, 2002. The rehearing petition was denied by the United States Court of Appeals for the Ninth Circuit on November 4, 2002. App., *infra*, 1a-2a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES, REGULATIONS AND EEOC INTERPRETIVE GUIDANCE INVOLVED

Pursuant to this Court's Rule 14.1(f) the relevant provisions of the Americans with Disabilities Act, 42 U.S.C. § 12102, *et seq.*, together with relevant portions of the ADA Regulations 29 U.S.C. § 1630.2, and EEOC Interpretive Guidance from Section 902

Definition of the Term "Disability", implementing those statutes, are reproduced at App., *infra*, 31a-45a.

Federal Rule of Evidence 702 - Testimony by Experts provides:

> "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case."

STATEMENT OF THE CASE

The Americans with Disabilities Act of 1990 ("ADA") prohibits covered employers from "discriminating" in the terms of employment against a "qualified individual with a disability," 42 U.S.C. § 12112(a), *i.e.*, "an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." 42 U.S.C. § 12111(8).

This case involves an important question regarding the application of the ADA for the protection of disabled individuals in the workplace. This important question is whether the EEOC Interpretive Guidance on the *Definition of the Term "Disability"* February 2000, is valid and should be followed in determining if an individual is substantially limited in the ability to engage in work under the ADA. The second question presented is whether the Federal Rule of Evidence 702

was properly applied when it was determined that Enright's vocational rehabilitation counselor did not qualify as an expert witness, despite the fact that he had previously testified as a vocational expert. His report determined Enright was precluded from approximately 29% of all jobs in the DOT due to his impairment. Therefore, his report would have assisted the court in determining whether Enright is substantially limited in his ability to work under the ADA. The third question is whether an Arbitrator's Decision under a Collective Bargaining Agreement is admissible evidence in an ADA case, where the Arbitrator exceeded the scope of submission by ruling on Petitioner's federal statutory rights under the ADA, and where the Arbitrator was not an impartial decisionmaker because he was exclusively chosen by Petitioner's adversaries.

A. Factual Background

Petitioner Paul Enright ("Enright") began his employment with Respondent Solar Turbines on April 21, 1997, as a Quality Test Technician ("QTT"). Starting on or about July 1998, about 14 months after Enright was hired, Solar Turbines began sending QTT's from Dept. 380 [Enright's Dept.] out to other areas of the plant to work. On July 6, 1998, Enright's supervisor, Mohammed Karbasi ("Karbasi"), requested that Enright go work out on the production line. Enright explained to Karbasi that exposure to diesel or propane fumes as well as other fumes present in this area would trigger his migraine headaches. Enright was instructed to obtain a doctor's letter as soon as possible for documentation. (Court of Appeals Excerpts of Record 43-45 ("C.A. ER 43-45")).

Following Karbasi's request for medical documentation, Enright submitted a medical letter

from Dr. Hoagland dated July 8, 1998. This letter stated as follows: "Paul Enright has a long history of headaches which are often set off by fumes, particularly from engine exhaust, painting and welding. I recommend that he work only in areas where he will not be exposed to fumes." C.A. ER 105.

Then, on July 16, 1998, a Employee Physical Classification Status Form (Form 900) was completed and initialed by the Solar Turbines Medical Dept. on behalf of Dr. Donna Baytop, Solar Turbine's Medical Director. This form stated that Enright was to "Avoid fumes, particularly from engine exhaust, painting and welding." C.A. ER 190. Therefore, on or before July 16, 1998, Solar Turbines started to accommodate Enright by permitting him to not work in other areas of the plant where he would be exposed to fumes. C.A. ER 45.

On December 4, 1998, Enright was informed by his two supervisors that there was no more work for him in Dept. 380 and that he would have to go to other areas of the plant where he would be exposed to fumes. Enright was given the opportunity to either wear a respirator mask in the work areas with fumes or to take a medical layoff. C.A. ER 45-46.

On December 10, 1998, Enright gave Solar Turbines and the Union a memo requesting reasonable accommodation. C.A. ER 188-189. The next day, on December 11, 1998, Enright attended a meeting which was to respond to his request for reasonable accommodation. In this meeting Enright was informed that his medical letter from Dr. Hoagland was now considered to be only a recommendation. C.A. ER 46. As stated above, Dr. Baytop had accepted Dr. Hoagland's letter on July 16, 1998, and issued an Employee Physical Classification

Status Form for Enright, which recommended he "Avoid fumes, particularly from engine exhaust, painting and welding." Despite this Form, Enright was informed that he would no longer be accommodated and would be sent out to other areas of the plant where he would be exposed to fumes without a mask, or could take personal leave, sick leave, or vacation. C.A. ER 46-47. Enright was also informed at this meeting that if he did not go where he was assigned he could be terminated. C.A. ER 172 at 269:2-19.

On December 15, 1998, only 5 days after Enright had requested reasonable accommodation, Lee Thomas, Enright's supervisor, gave Enright a verbal warning (which was put in writing) for lack of productivity. C.A. ER 47 & 191. Enright was given little chance to discuss the verbal warning given to him by Lee Thomas. Enright responded to this verbal warning in a letter given to Ken McDill, Union Chief Shop Steward. C.A. ER 162, 192-199.

Enright returned to work on January 4, 1999, from Christmas break and continued to work up through January 26, 1999, in his regular working area within Dept. 380 without further confrontations with Solar management. Enright also did not complain about fumes in his work area during this time period. C.A. ER 161.

On January 27, 1999, Enright was walked out during the second half of his shift on a medical layoff due to a revised Physical Classification Status Form and the fact that Solar Turbines could not guarantee that there would be no fumes in Enright's work area. C.A. ER 48. At the time Dr. Baytop issued the revised Physical Classification Status Form, the only doctor's letter that Enright had given Solar Turbines was from Dr. Hoagland. Enright also had never met with, or

been examined by Dr. Baytop or any other company physician. C.A. ER 162. This revised Form stated, "To work only in areas where there is no exposure to fumes, particularly from engine exhaust, painting and welding. Avoidance of fumes does not involve use of respirator." C.A. ER 200. At the meeting Enright discussed possible options of accommodation such as allowing him to step out of the building when fumes came into the building or doing software testing in the adjacent software trailer. Solar Turbines told Enright the decision had been made. C.A. ER 48.

On or about February 8, 1999, the Local Lodge 389 filed a grievance on Enright's behalf which stated that Solar Turbines violated provisions of the ADA as well as the CBA. C.A. ER 106.

Enright was examined by Dr. Kaye Kilburn on April 19, 1999, and a medical letter dated May 4, 1999, with supplement was issued which stated:

> "...he [Enright] has found many chemicals and chemical mixtures trigger headaches. These include perfume, incense, hair spray, gasoline fumes, paint, diesel exhaust, propane exhaust, welding fumes, engine exhaust, turbo soap, restroom cleaning chemicals, new carpet, tar and asphalt fumes, chimney smoke and charcoal grill fumes." ... "The avoidance of chemical triggers is essential to avoid headaches and disability." App., *infra,* 55a; C.A. ER 132.

On December 9, 1999, Enright applied for vocational rehabilitation services through the State of California Department of Rehabilitation. Enright was subsequently determined to be severely disabled and approved for an estimated 12 months of rehabilitation services. App., *infra,* 57a-58a; C.A. ER 174. These

resulting rehabilitation services were addressed in a State of California Rehabilitation Retraining Contract. This retraining contract states,

> "Mr. Enrights a 42 y/o male who is eligible for department's services based MIOR, intake, and Medical review which verifies Dx of multiple chemical sensitivity which causes severe miagraine [migraine] headaches that impedes his balance, coordination, concentration and focus thus contraindicating his return to his previous [field of] employment as an Electronic Technician. Mr. Enright received his Associates Degree in Electronic Technology from Cuyamaca College." ... "To re-enter the competitive labor market he will need to be retrained in a field that will accommodate his impairment/impediments." App., *infra*, 60a; C.A. ER 176.

Due to a pending Workers' Compensation claim, Enright consulted with Mark Remas, a vocational rehabilitation counselor, to determine the percentage of disability which Enright's impairment would cause him in the labor market. Subsequently, in September 2000, Mark Remas issued a Vocational Evaluation Report. This report states that Mark Remas has previously testified as an expert witness as follows:

> "I have previously testified as a vocational expert in Social Security Administration hearings, Workers' Compensation Appeals Board actions, Department of Labor actions, dissolution proceedings and personal injury litigation;" App., *infra*, 70a; C.A. ER 207.

This report additionally states:

> "Mr. Enright has provided a variety of medical

> reports, published articles, work environment analysis data, and has attended interviews with this counselor." . . . "This information was reviewed and independently replicated by this counselor to determine the validity of sorting job classifications based on medical restrictions. The medical reports were reviewed and utilized to assess the diagnosis and restrictions that are applicable in this case." App., *infra,* 65a-66a; C.A. ER 203.
>
> . . . "Once the data were sorted the number of jobs that have excessive exposure to fumes, exhaust, or other contaminants that are injurious to Mr. Enright were painstakingly tabulated. The results indicated preclusion from approximately 29% of all jobs listed in the Dictionary of Occupational Titles." App., *infra,* 67a; C.A. ER 204.

Enright was notified on October 20, 2000, by Local Lodge 389 that his grievance with Solar Turbines was to be arbitrated. This was a month after Enright had filed suit against Local Lodge 389 in the district court for discrimination and retaliation in violation of the ADA. C.A. ER 160 & 173.

Enright's Union grievance was arbitrated on December 11 and 22 of 2000. Enright had no input into the choosing of the arbitrator. At the time the Arbitrator was jointly chosen by Solar Turbines and Local Lodge 389, Enright had an adversarial relationship with both Solar Turbines and Local Lodge 389. This adversarial relationship was due to the fact that Enright had already filed suit against both of them in the district court for violations of the ADA. C.A. ER 160. Subsequently, on March 29, 2001, the Arbitrator issued a written opinion. App., *infra,* 17a-30a; C.A. ER 81-95.

B. District Court Proceedings

In September 2000, after obtaining a right to sue letter from the Equal Opportunity Employment Commission ("EEOC"), Enright filed this action against Solar Turbines in the United States District Court Southern District of California. The basis for federal jurisdiction over this complaint is pursuant to the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12112. App., *infra*, 5a-6a. Enright alleged, *inter alia*, that Solar Turbines had violated the ADA by (1) denying him reasonable accommodation, and instead, walking him out on a medical layoff and continuing to intentionally discriminate against him because of his disability, and (2) retaliating against him for exercising his rights to reasonable accommodation. C.A. ER 7-9.

On Nov. 1, 2001, the district court granted summary judgment to Solar Turbines. App., *infra*, 5a-6a. The district court first evaluated Enright's argument that he has a physical impairment that "substantially limits" his major life activity of work. The district court stated, "To support his argument, Plaintiff offers six declarations as exhibits. Whether Plaintiff has raised a genuine issue of material fact that he is substantially limited in working depends upon an evaluation of the merits of those exhibits." Three of the exhibits consisted of doctors' letters from Dr. Hoagland, Dr. Dalessio, and Dr. Kilburn. The other exhibits were a Vocational Evaluation Report from Mark Remas, a Severity of Disability Determination and a Retraining Contract from the California State Department of Rehabilitation. The district court evaluated each of the exhibits separately and summarily determined that, "Plaintiff is not substantially limited in the major life activity of working, and that he is, thus, not disabled under the terms of the ADA." App., *infra*, 15a.

In regards to Mark Remas' Vocational Rehabilitation Report, the district court ruled, "The Court sustains Defendant's objections to the Declaration of Mark Remas, based upon lack of personal knowledge under Federal Rule of Evidence 502 and improper opinion evidence by a lay person under Federal Rule of Evidence 701." App., *infra,* 13a-14a. The district court did not address Mark Remas' qualifications as an expert witness, which included having "previously testified as a vocational expert in Social Security Administration hearings, Workers' Compensation Appeals Board actions, Department of Labor actions, dissolution proceedings and personal injury litigation." App., *infra,* 70a; C.A. ER 207.

On the issue of whether the Arbitrator's written decision should be admissible as evidence the district court ruled, "the decision of an arbitrator may be admitted as evidence and 'accorded such weight as the court deems appropriate.' Alexander v. Gardener-Denver Co., 94 S.Ct. 1011, 1025 n. 21 (1974); see also Vargas v. Gromko, 977 F. Supp. 996, 1002 (1997)." App., *infra,* 10a. In making this ruling the district court did not address whether the Arbitrator exceeded the scope of submission by ruling on Enright's federal statutory rights under the ADA, or the fact that the Arbitrator was exclusively chosen by Enright's adversaries.

C. The Ninth Circuit's Panel Decision

A panel of the Ninth Circuit affirmed. App., *infra,* 3a-4a. The panel first addressed whether Enright is substantially limited in his ability to work. The panel found that, "Enright's letters from examining physicians and occupational rehabilitation and retraining records show some level of impairment, but they do not show a substantial limitation on his ability

to engage in work. *See Toyota Motor Mfg., Kentucky, Inc. v. Williams*, 122 S.Ct. 681, 691 (2002)." App., *infra*, 4a.

The panel then ruled that, "the district court properly determined that Enright's vocational rehabilitation counselor did not qualify as an expert witness under Federal Rule of Evidence 702. *See Desrosiers v. Flight Int'l of Fla.*, 156 F.3d 952, 960-61 (9th Cir. 1998)." App., *infra*, 4a.

On the issue of the arbitration decision the panel found that, "Contrary to Enright's contention, the district court did not err by considering the arbitrator's decision. *See Collings v. Longview Fibre Co.*, 63 F.3d 828, 833 n.5 (9th Cir. 1995)." App., *infra*, 4a.

REASONS FOR GRANTING THE WRIT

The Ninth Circuit decision in this case presents a recurring question under the ADA. The issue is what level of impairment constitutes a substantial limitation on the ability to engage in work and what standards are to be used to make this determination. This leads to the question of whether the EEOC Interpretive Guidance on the *Definition of the Term "Disability"* February 2000, is valid and should be followed in determining if an individual is substantially limited in the ability to engage in work under the ADA. Intervention by the Supreme Court is needed to set clear consistent standards and guidelines for determining whether an individual is substantially limited in the ability to work under the ADA.

The Supreme Court has presently left open the question of whether working is a major life activity. "Because of the conceptual difficulties inherent in the argument that working could be a major life activity, we have been hesitant to hold as much, and we need not decide this difficult question today." *Toyota Motor Mfg., Kentucky, Inc. v. Williams*, 122 S.Ct. 681, 692 (2002).

Additionally, the Supreme Court has also left open the question of whether the EEOC regulations and interpretive guidance 42 U.S.C. § 12102(2) relating to the definition of the term "disability" are valid. The Supreme Court stated in *Albertson's, Inc. v. Kirkingburg*, 527 U.S. 555, 563, n. 10, 119 S.Ct. 2162, 144 L.Ed.2d 518 (1999) as follows:

> "10. As the parties have not questioned the regulations and interpretive guidance promulgated by the EEOC relating to the ADA's definitional section, 42 U. S. C. § 12102; for the purposes of this case, we assume, without deciding, that such regulations are valid, and we have no occasion to decide what level of deference, if any, they are due, see *Sutton v. United Airlines, Inc.*, ante, at 479-480." [527 U.S. 479-480].

Therefore, intervention by the Supreme Court on the above issues will give the lower courts clear consistent standards and guidelines for determining whether an individual is substantially limited in the ability to work. Without Supreme Court intervention the lower courts can apply arbitrary standards and disabled individuals will not receive the intended protections afforded by the ADA.

The Ninth Circuit holding that Mark Remas, Enright's vocational rehabilitation counselor, did not

qualify as an expert witness under Federal Rule of Evidence 702, also merits intervention by the Supreme Court. The question is whether the Federal Rule of Evidence 702 was properly applied in determining that Mr. Enright's vocational rehabilitation counselor did not qualify as an expert witness, despite the fact that he has previously testified as a vocational expert, and does his report which concluded that Mr. Enright was precluded from approximately 29% of all jobs in the *Dictionary of Occupational Titles* (DOT) due to his impairment, create a triable issue of material fact as to whether Mr. Enright is disabled under the ADA?

Mark Remas, Enright's vocational rehabilitation counselor, has "previously testified as a vocational expert in Social Security Administration hearings, Workers' Compensation Appeals Board actions, Department of Labor actions, dissolution proceedings and personal injury litigation;" App., *infra*, 70a; C.A. ER 207. If appeals courts are allowed to arbitrarily eliminate key evidence that would assist the court in determining whether an individual's impairment substantially limits their ability to work, then the ADA will be of no value in protecting those individuals in the workplace. This Court should grant review to resolve this misapplication of the Federal Rule of Evidence 702 and clarify the standards by which this rule is to be applied.

The Ninth Circuit ruled that the district court did not err by considering the arbitrator's decision. The question involved with this ruling is whether an arbitrator's decision under a Collective Bargaining Agreement is admissible evidence in an ADA case, where the arbitrator exceeded the scope of submission by ruling on Petitioner's federal statutory rights under

the ADA, and where the arbitrator was not an impartial decisionmaker because he was exclusively chosen by Petitioner's adversaries. This Ninth Circuit ruling is in direct conflict with the Supreme Court decisions in *Teachers v. Hudson*, 475 U.S. 292, 307–308 (1986) and *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 53-54 (1974). Thus, intervention by the Supreme Court is necessary to resolve this conflict.

I. THE NINTH CIRCUIT'S DECISION DISREGARDS EEOC INTERPRETIVE GUIDANCE ON THE DEFINITION OF THE TERM "DISABLITITY"

The Ninth Circuit panel held that, "Enright's letters from examining physicians and occupational rehabilitation and retraining records show some level of impairment, but they do not show a substantial limitation on his ability to engage in work." App., *infra*, 4a. This decision by the panel is contrary to the EEOC's interpretive guidance presented in its Compliance Manual under Section 902 Definition of the Term "Disability" which was last modified February 1, 2000. App., *infra*, 35a-45a. If this EEOC interpretive guidance had been properly considered the panel would have concluded that Enright is substantially limited in his ability to work.

The panel characterized Enright's impairment as "migraines caused by exposure to chemical fumes." App., *infra*, 4a. This statement oversimplifies Enright's impairment, and could therefore lead to a misunderstanding of the magnitude of his impairment in relation to occupations that he can not perform due to exposure to fumes and odors that trigger migraine headaches. Enright's medical letter from Dr. Kaye Kilburn (App., *infra*, 46a-56a; C.A. ER 125-132) lists the fumes and odors that he should avoid to prevent

triggering of migraine headaches, they are as follows (with appendix references as to where they can be found in his medical letter):

(1) Cigarette Smoke (46a)
(2) Diesel Engine Exhaust (46a)
(3) Gasoline Engine Exhaust (46a)
(4) Propane Exhaust (55a)
(5) Engine Exhaust (55a)
(6) Insecticides (53a)
(7) Perfume (55a)
(8) Incense (55a)
(9) Hair Spray (55a)
(10) Gasoline Fumes (55a)
(11) Paint (55a)
(12) Welding Fumes (55a)
(13) Turbo Soap (55a)
(14) Restroom Cleaning Chemicals (55a)
(15) New Carpeting (55a)
(16) Tar and Asphalt Fumes (55a)
(17) Chimney Smoke (55a)
(18) Charcoal Grill Fumes (55a)
(19) Combustion Products (55a)

Under the heading "Extent of disability and work limitation", Dr. Kaye Kilburn in his letter states, "The avoidance of chemical triggers is essential to avoid headaches and disability." App., *infra*, 55a. Therefore, it is clear that Enright must avoid the above list of chemical triggers and thus, is excluded from a class of jobs or a broad range of jobs in various classes. For example it is clear that Enright would be excluded from the following jobs because of the specific exposure restrictions above:

(1) Diesel Equipment Operator – (2) Diesel Engine Exhaust

(2) Diesel Engine Mechanic - (2) Diesel Engine Exhaust
(3) Bus Driver - (5) Engine Exhaust
(4) Truck Driver - (5) Engine Exhaust
(5) Taxi Driver - (5) Engine Exhaust
(6) Parking Lot Attendant - (3) Gasoline Engine Exhaust
(7) Auto Mechanic - (3) Gasoline Engine Exhaust
(8) Pest Control Worker - (6) Insecticides
(9) Gas Station Attendant - (10) Gasoline Fumes
(10) Painter - (11) Paint
(11) Welder - (12) Welding Fumes
(12) Carpet Installer - (15) New Carpet
(13) Street Paver - (16) Tar and Asphalt
(14) Fire Fighter - (17) Chimney Smoke

This is just a small sample of the jobs that Enright is excluded from due to his impairment. Additionally, Enright must avoid perfume, as listed above, and therefore, would be excluded from any jobs where he would come in contact with the general public and could be exposed to perfume.

The EEOC offers the following interpretive guidance when dealing with cases such as Enright's, "Furthermore, in cases where it is clear that an individual is excluded from a class of jobs or a broad range of jobs in various classes, only minimal evidence will be required." App., *infra*, 43a. Additionally, the EEOC interpretive guidance states,

> "The Commission has provided regulatory guidance for determining whether an impairment substantially limits an individual in the major life activity of working. The regulation states, (3) With respect to the major life activity of working -- (i) The term substantially limits means significantly restricted in the ability to perform either a class of

jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities. . . ." 29 C. F. R. § 1630.2(j)(3)(i). App., *infra*, 37a.

Therefore, per the medical letter from Dr. Kaye Kilburn which lists the fumes and odors that Enright should avoid to prevent triggering of migraine headaches and the EEOC interpretive guidance and regulations above, it should be clear that Enright's impairment substantially limits his ability to work.

The EEOC has also given interpretive guidance in the form of general examples of individuals who have specific types of impairments that have caused them to be substantially limited in working. Some of these examples, which are similar to Enright's case, can be a valuable resource in guiding the courts in their determination of whether an impairment substantially limits an individual's ability to work. The EEOC gives the following example of interpretive guidance:

"CP has a hearing impairment that only mildly affects his ability to hear. The impairment, however, makes CP extremely sensitive to very loud noises. CP experiences severe pain when he is exposed to loud noises for more than a brief period. Because of this sensitivity, CP cannot work in environments where noise levels routinely exceed a certain decibel level. As a result, R refused to hire CP for a welder's position. Further, CP could not work in carpentry or auto repair shops and could not be a heavy equipment operator, a demolitions expert, or a member of an airport ground crew. CP's impairment, therefore, prevents CP from working in a broad range of jobs in various classes. Accordingly, CP has an impairment that substantially limits his ability to work." App. 41a.

This example is quite similar to Enright's case, in the example case, an individual has an impairment that makes him extremely sensitive to loud noises and therefore, he cannot work in environments where noise levels routinely exceed a certain decibel level. Thus, this individual's impairment substantially limits his ability to work. Whereas, Enright's impairment requires his avoidance of many fumes and odors to prevent triggering of migraine headaches and therefore, he cannot work in environments where he will be exposed to these fumes and odors. As listed above, Enright could not work in the following jobs: diesel equipment operator, diesel mechanic, bus driver, truck driver, taxi driver, parking lot attendant, auto mechanic, pest control worker, gas station attendant, painter, welder, carpet installer, street paver, and fire fighter. Thus, Enright would also be substantially limited in his ability to work.

Additionally, The EEOC gives the following example of interpretive guidance:

> "Impairments that preclude an individual from performing a broad range of jobs in various classes also may substantially limit the major life activity of working. For example, an individual could be substantially limited in working if (s)he has a severe allergy to a substance found in many high-rise office buildings. If the allergy prevents the individual from working in many of the high-rise office buildings in the geographical area to which the individual has reasonable access, then the individual is substantially limited in working. This is so because a great number of positions within many classes of jobs would be performed in those buildings. 29 C.F.R. pt. 1630 app. § 1630.2(j)." App., *infra*, 40a.

This example is also quite similar to Enright's case, in the example case, an individual has a severe allergy to substances found in many high-rise office buildings, whereas Enright, to prevent triggering of migraine headaches must avoid many fumes and odors which are present in many buildings and work environments. Therefore, Enright would also be substantially limited in working because a great number of positions within many classes of jobs would be performed in those buildings and work environments.

Enright provided evidence of his impairment to the district court which included a "Severity of Disability Determination" and a Retraining Contract from the State of California Department of Rehabilitation. App., *infra*, 57a-64a; C.A. ER 174-178. The "Severity of Disability Determination" categorizes Enright as severely disabled and therefore, qualified him for an estimated 12 months of rehabilitation services. App., *infra*, 57a-58a. These resulting rehabilitation services were addressed in a Department of Rehabilitation Retraining Contract. This Retraining Contract states,

> "Mr. Enrights a 42 y/o male who is eligible for department's services based MIOR, intake, and Medical review which verifies Dx of multiple chemical sensitivity which causes severe miagraine [migraine] headaches that impedes his balance, coordination, concentration and focus thus contraindicating his return to his previous [field of] employment as an Electronic Technician. Mr. Enright received his Associates Degree in Electronic Technology from Cuyamaca College." . . . "To re-enter the competitive labor market he will need to be retrained in a field that will accommodate his impairment/impediments." App., *infra*, 60a.

Therefore, the State of California Department of Rehabilitation determined that Enright would no longer be able to return to his previous field of employment as an Electronic Technician, for which he had been trained, because of his impairment. Thus, he would need to be retrained to re-enter the competitive labor market in a field that would accommodate his impairment. In a similar case to Enright's, the EEOC gives the following example of interpretive guidance:

> "An assessment of whether an impairment substantially limits an individual's ability to work focuses on whether the individual is significantly restricted in the ability to perform a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills, and abilities. 29 C.F.R. § 1630.2(j)(3)(i). For example, suppose that an individual has an impairment that interferes with his/her ability to work in the class of clerical jobs. The individual is substantially limited in working if (s)he is significantly restricted in performing clerical work as compared to the average person having comparable clerical skills. Thus, if the individual has clerical skills and training and the impairment prevents him/her from performing many of the clerical jobs that the average person with comparable clerical skills can perform, then the individual is substantially limited in working. App., *infra*, 43a-44a.

This example is quite similar to Enright's case, in the example case, an individual has an impairment that significantly restricts him/her from performing clerical work as compared to the average person with comparable skills and therefore, is substantially limited in working. Whereas, Enright has an

impairment which significantly restricts him from performing Electronic Technician work (he can no longer return to this field of employment due to his impairment) as compared to the average person with comparable skills and therefore, is substantially limited in working.

Thus, contrary to the Ninth Circuit's decision, and based on the EEOC interpretive guidance Section 902 Definition of the Term "Disability", Enright's impairment substantially limits his ability to engage in work and therefore, he has a "disability" under the ADA. See 42 U.S.C. § 12102 (2). App., *infra,* 31a. This Court should grant review to correct this erroneous decision of the Ninth Circuit and clarify the standards and guidelines for determining whether an individual is substantially limited in the ability to work.

II. THE NINTH CIRCUIT DID NOT PROPERLY APPLY THE FEDERAL RULE OF EVIDENCE 702 AND THEREBY ELIMINATED KEY EVIDENCE IN THE EVALUATION OF ENRIGHT'S IMPAIRMENT

The Ninth Circuit held that, "Enright's vocational rehabilitation counselor did not qualify as an expert witness under Federal Rule of Evidence 702." App., *infra,* 4a. This decision overlooked the numerous qualifications of Mark Remas, Enright's Vocational Rehabilitation Counselor, which were listed in his Vocational Evaluation Report on Mr. Enright.

Federal Rule of Evidence 702 states:

> "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify

thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case."

Mark Remas' Vocational Evaluation Report on Mr. Enright listed his qualifications as an expert witness as follows:

"I, Mark Remas, M.A., C.R.C. declare and state:

1. My name is Mark Remas, and I am a certified vocational rehabilitation counselor;
2. I am the owner of a vocational rehabilitation counseling firm and function as the senior counselor and supervisor in addition to my personal work activity as a certified vocational rehabilitation counselor.
3. I have been certified (as of 1989) as a rehabilitation counselor by the National Commission on Rehabilitation Counselors. I have also been designated as a vocational expert for the Social Security Administration, Department of Hearings and Appeals.
4. My current practice consists of providing vocational rehabilitation services to injured workers under the California Labor Code 139.5 which includes preparation of job descriptions and job analyses as well as vocational exploration and job placement assistance. Other duties include preparation of labor market surveys, coordinating and commenting on residual functional capacity, wage earning capacity studies, personal injury litigation, and testimony for the Social Security Administration, Department of Hearings and Appeals.
5. The preparation of a job analysis requires visual

inspection of the job site, and visual observation of the performance of a particular job, and requires an outline of the job requirements, physical demands, job tasks and responsibilities, and equipment and work aids that are used on the job. Preparation of a job analysis also requires quantification of the specific requirements during the day of lifting, stooping, bending, carrying, etc. as well as the particular weights that are lifted and carried at work during the day;

6. I have been preparing labor market surveys in San Diego since 1982;

7. I consider myself to be a vocational expert on the San Diego labor market. That is based in part on my years of experience and the time I have spend in San Diego contacting and talking to employees and employers, determining labor market needs and wages, preparing job analyses and position descriptions for specific jobs, and assisting injured workers in returning to suitable gainful employment;

8. I have previously testified as a vocational expert in Social Security Administration hearings, Workers' Compensation Appeals Board actions, Department of Labor actions, dissolution proceedings and personal injury litigation; . . ." App., *infra*, 69a-70a; C.A. ER 206-207.

Therefore, contrary to the Ninth Circuit's decision, Mark Remas has the required knowledge, skills, experience, training, and education, as stated above, that should qualify him as an expert witness under Federal Rule of Evidence 702.

Additionally, Mark Remas states in this report:

"9. I personally interviewed Mr. Enright and evaluated the information he provided including medical reports, and data derived from the O*NET and

other US government resources.

10. I replicated the study steps taken by Mr. Enright and concur with the evaluation of degree of disability of 29% of all occupations based on quantification of medical restrictions as a result of multiple chemical sensitivity." App., *infra*, 70a.

Therefore, Mark Remas' Vocational Evaluation Report concluded that Enright had a degree of disability that precluded him from 29% of all occupations and would have assisted the panel in determining that Enright is substantially limited in his ability to work. As stated above, Mark Remas evaluated medical reports and utilized US government data and resources in his Vocational Evaluation Report. Thus, the report should also, meet the additional requirements of Federal Rule of Evidence 702 as stated above. This Court should grant review to resolve this misapplication of the Federal Rule of Evidence 702 and clarify the standards by which this rule is to be applied.

III. THE NINTH CIRCUIT'S RULING ALLOWING CONSIDERATION OF THE ARBITRATION DECISION IS IN DIRECT CONFLICT WITH SUPREME COURT DECISIONS

The Ninth Circuit concluded that, "the district court did not err by considering the arbitrator's decision." App., *infra*, 4a. This ruling does not take into account that the Arbitrator exceeded the scope of submission by ruling on Enright's federal statutory rights under the ADA, and that the Arbitrator was not an impartial decisionmaker because he was exclusively chosen by Enright's adversaries. Therefore, this ruling is in direct conflict with the Supreme Court decisions in *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 53-54 (1974) and *Teachers v. Hudson*, 475 U.S. 292, 307–

308 (1986).

The Arbitrator's decision should not have been considered by the district court because the Arbitrator exceeded the scope of submission by ruling on Enright's federal statutory rights under the ADA. The district court stated in its decision that,

> "The Arbitrator concluded that Plaintiff's condition, Multiple Chemical Sensitivity, does not constitute a disability within the meaning of the ADA. (SUF No. 65; Emer Decl., Ex. 3 at 82.) The Arbitrator further found that Plaintiff was not "qualified" as defined by the ADA (SUF No. 66), and could not be "reasonably accommodated" within the meaning of the ADA. (SUF No. 67.)" App., *infra*, 9a. (Also see the Opinion of the Arbitrator at App., *infra*, 17a-30a).

The Supreme Court has held that an arbitrator interpreting a collective bargaining agreement "has authority to resolve *only questions of contractual rights*" and if he rules on federal statutory rights he has exceeded the scope of submission and the award will not be enforced. *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 53-54 (1974).

Therefore, since the Arbitrator ruled on Enright's federal statutory rights his decision should not be enforced and should not have been considered by the district court. Thus, the Ninth Circuit's decision to allow consideration of the Arbitrator's decision is in direct conflict with the above Supreme Court decision. This Court should grant review to resolve this conflict.

Additionally, the Arbitrator's decision should not have been considered by the district court because the Arbitrator was not an impartial decisionmaker, due to

the fact he was exclusively chosen by Enright's adversaries. Enright had no input in choosing the arbitrator. The Arbitrator was chosen jointly by Local Lodge 389 and Solar Turbines. At the time the Arbitrator was chosen, Enright had an adversarial relationship with both Solar Turbines and Local Lodge 389 because he had already filed suit against both of them in the district court for violations of the ADA. C.A. ER 160.

The Supreme Court case of *Teachers v. Hudson*, 475 U.S. at 307-308 (1986), presents a similar situation. The Court held that because the union had unrestricted choice of arbitrators from a state list the arbitrator was not an impartial decisionmaker for resolving conflicts between the union and its nonmembers. Based on this Supreme Court decision the Arbitrator in Enright's case, who was exclusively chosen by his joint adversaries, was not an impartial decisionmaker. Thus, the Arbitration decision should not have been considered by the district court.

Therefore, the Ninth Circuit's decision to allow consideration of the Arbitrator's decision is in direct conflict with the above Supreme Court decisions and this Court should grant review to resolve these conflicts.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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Pro Se Petitioner

January 27, 2003

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PAUL ENRIGHT, Plaintiff-Appellant,

v.

SOLAR TURBINES, INC., Defendant-Appellee.

No. 01-57116

Appeal from the United States District Court
For the Southern District of California;
Napoleon A. Jones, Jr., District Judge,
Presiding. D.C. No. 00-CV-1842-NAJ

[Filed Nov. 4, 2002]

ORDER

Before: HUG, O'SCANNLAIN and TASHIMA, Circuit Judges.

The panel has voted to deny appellant's petition for panel rehearing. Judges O'Scannlain and Tashima vote to deny the petition for rehearing en banc, and Judge Hug so recommends.

The full court has been advised of the petition for rehearing en bane and no judge has requested a vote on whether to rehear the matter en banc. *See* Fed. R. App. P. 35.

The petition for panel rehearing and the petition for rehearing en banc are denied.

No further filings will be accepted in this closed appeal.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PAUL ENRIGHT, Plaintiff-Appellant,

v.

SOLAR TURBINES, INC., Defendant-Appellee.

No. 01-57116

Appeal from the United States District Court
For the Southern District of California;
Napoleon A. Jones, Jr., District Judge,
Presiding. D.C. No. 00-CV-1842-NAJ

Submitted Sep. 9, 2002**
Filed Sep. 19, 2002

MEMORANDUM*

Before: HUG, O'SCANNLAIN and TASHIMA, Circuit Judges.

Paul Enright appeals pro se the district court's

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

summary judgment order dismissing his claim under the Americans with Disabilities Act ("ADA") against his former employer. We have jurisdiction pursuant to 28 U.S.C. § 1291. We review de novo the district court's grant of summary judgment, *Humphrey v. Mem'l Hosps. Assoc.*, 239 F.3d 1128, 1133 (9th Cir. 2001), and we affirm.

Enright contends the district court erred by finding he was not substantially limited in a major life activity due to migraines caused by exposure to chemical fumes. *See* 42 U.S.C. § 12102 (2). Enright's letters from examining physicians and occupational rehabilitation and retraining records show some level of impairment, but they do not show a substantial limitation on his ability to engage in work. *See Toyota Motor Mfg., Kentucky, Inc. v. Williams*, 122 S.Ct. 681, 691 (2002). Further the district court properly determined that Enright's vocational rehabilitation counselor did not qualify as an expert witness under Federal Rule of Evidence 702. *See Desrosiers v. Flight Int'l of Fla.*, 156 F.3d 952, 960-61 (9th Cir. 1998).

Contrary to Enright's contention, the district court did not err by considering the arbitrator's decision. *See Collings v. Longview Fibre Co.*, 63 F.3d 828, 833 n.5 (9th Cir. 1995). Enright's contention that the district court improperly denied oral argument is without merit because Enright does not show resulting prejudice. See Partridge y. Reich, 141 F.3d 920, 926 (9th Cir. 1998).

AFFIRMED.

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

PAUL ENRIGHT, Plaintiff,

v.

SOLAR TURBINES, INC., Defendant.

No. 00-CV-1842-NAJ

ORDER GRANTING SOLAR TURBINES' MOTION FOR SUMMARY JUDGMENT

[Filed Nov. 1, 2001]

INTRODUCTION

A. Procedural Background

Plaintiff Paul Enright ("Plaintiff") filed a complaint on September 13, 2000 alleging a violation of the Americans with Disability Act ("ADA"), 42 U.S.C. § 12112. Plaintiff claims that Defendant Solar Turbines, Inc. ("Defendant") discriminated against him on the basis of his disability when it placed him on medical layoff in January, 1999. (Compl. ¶ 28.)

Plaintiff filed a charge with the Equal Employment Opportunity Commission ("EEOC") on February 8, 1999, within 180 days of Defendant's alleged discriminatory practices. (Compl. ¶ 3-4). This action was brought within 90 days of the date Plaintiff

received a "Right to Sue" letter. (Compl. ¶ 4) On June 26, 2000, the EEOC dismissed the case because it was "unable to conclude that the information obtained establishes violations of the statutes. " (Declaration of Jan Sutton ("Sutton Decl") at Ex. 5.) On May 17, 2001, Defendant filed a Motion for Summary Judgment, or, in the Alternative for Summary Adjudication of Claims. For the reasons set forth below, Defendant's Motion for Summary Judgment is GRANTED.

B. Factual Background

Plaintiff was hired by Defendant on April 21, 1997, as a Quality Test Technician ("QTT"). (Compl. ¶ 11) The job duties of a QTT include testing various products produced by Defendant, in order to ensure product performance. (Decl. of William Emer ("Emer Decl."), Ex. 1 at 6.) QTTs are exposed to dust, exhaust fumes, chemical fumes, paint fumes, and metal fumes while performing their duties. (Statement of Uncontroverted Fact ("SUF") No. 3; Declaration of Jan Sutton ("Sutton Decl.") at Ex. 1). The QTTs are based in Department 380 at Defendant's Kearny Mesa facility. (SUF No. 1). The products tested by QTTS are located throughout the Kearny Mesa facility, including Department 370 and the Paint Shop. (SUF No. 4).

During Plaintiffs job interview. Department 380 supervisor Lee Thomas informed Plaintiff that QTTS work throughout the facility, including Department 379 and the Paint Shop. (SUF No. 8.) Plaintiff did not voice any objection during the interview about being required to work throughout the facility. (SUF No. 9.) Plaintiff received a tour of the facility, including Department 379 and the Paint Shop, while the facility was in normal operation. (SUF Nos. 10-12.) Plaintiff did not state during the interview or on his April 11,

1997 Employee Medical Record that he was bothered by fumes or chemical substances, or that he had a history of migraine headaches. (SUF No. 13-4.) In fact, Plaintiff had experienced headaches beginning in 1996, and consulted his physician, Dr. Daniel Hoagland, M.D., about the headaches in May 1996. (SUF Nos. 16-18; Pl.'s Statement of Genuine Issues at 5.)

After Plaintiff was hired, he told his supervisor, Mr. Mohammed Karbasi, that his migraine headaches were triggered by fumes, and that he would not be able to work in Department 379 because he got headaches in this area. (SUF No. 21-22; Pl.'s Statement of Genuine Issues at 6.) Defendant told Plaintiff to obtain a doctor's letter as soon as possible to document his medical restrictions. (Compl. ¶ 13.) Plaintiff provided a letter from his physician, Dr. Hoagland, stating "I recommended that [Plaintiff] work only in areas where he will not be exposed to fumes." (Sutton Decl. at Ex. 3.) Plaintiff's migraine headaches did not interfere with his ability to perform his job, and Plaintiff never missed a day of work due to his headaches until he was placed on medical layoff on January 27, 1999. (SUF No. 28; Pl.'s Statement of Genuine Issues at 8.)

Plaintiff has been diagnosed with a disability called Multiple Chemical Sensitivity, which restricts his ability to work near dust, fumes, and smoke. (Emer Decl., Ex. 3 at 82.) Fumes are present in Department 379, Department 380, the Paint Shop, and the assembly area. (SUF Nos. 37-41.) Plaintiff was also exposed to fumes when he walked from the parking lot to Department 380. (SUF No. 35.) Despite the fact that fumes are present in Department 380 (SUF No. 38), Plaintiff states that he "would have been able to continue working" in Department 380 "for an

indefinite period of time."[1] (Pl.'s Statement of Genuine Issues at 11.)

Plaintiff worked in the software trailer for approximately three to four weeks to become familiar with software testing procedures. (SUF No. 44.) It takes a minimum of six months to a year for a QTT to become fully proficient in software testing. (Emer Decl., Ex 1 at 49-50.) Though the software trailer was air conditioned, fumes were present in the software trailer. (SUF No. 43; Pl.'s Statement of Genuine Issues at 12.) Plaintiff experienced headaches for some of the time while in the software trailer. (SUF No. 46.)

Plaintiff met with representatives from Defendant International Association of Machinists & Aerospace Workers Union Local Lodge 389 ("Local Union") on December 7, 1998 to discuss the options available to him. On January 27, 1999, pursuant to a Letter of Understanding between Defendant and the Local Union, Defendant advised Plaintiff that he was being placed on medical layoff. (SUF No. 52.)

The Local Union filed a grievance on Plaintiff's behalf on February 6, 1999, alleging that Plaintiff's medical layoff violated the Collective Bargaining Agreement and the ADA. (SUF No. 58.) The Grievance proceeded to arbitration, and a hearing was held on December 11 and 22, 2000 in San Diego, California, before Arbitrator Joseph Gentile. (SUF No. 59.) Plaintiff attended the hearing, and was an active participant in presenting his side of the case. (SUF No. 60.)

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[1] This statement directly contradicts Plaintiffs testimony during the arbitration hearing, in which he stated that he did not believe he could work in Department 380 "because of the exposure to exhaust." (Emer Decl., Ex. 1 at 42.)

The Arbitrator issued a written decision on March 29, 2001, finding that Defendant did not violate the Collective Bargaining Agreement or unlawfully discriminate against Plaintiff when it (1) placed him on medical layoff on or about January 27, 1999, and (2) failed to recall him thereafter. (SUF No. 64; Emer Decl., Ex. 3 at 85). The Arbitrator concluded that Plaintiff's condition, Multiple Chemical Sensitivity, does not constitute a disability within the meaning of the ADA. (SUF No. 65; Emer Decl., Ex. 3 at 82.) The Arbitrator further found that Plaintiff was not "qualified" as defined by the ADA (SUF No. 66), and could not be "reasonably accommodated" within the meaning of the ADA. (SUF No. 67.)

DISCUSSION

A. Standard of Law for Summary Judgment

Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. FED. R. CIV. P. 56(c). The party seeking summary judgment always bears the initial responsibility of identifying those portions of "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, which it believes demonstrates the absence of a genuine issue of material fact." Id.; Celotex v. Catrett, 477 U.S. 317, 323 (1986). To the extent the moving party fails to satisfy this initial burden of production, summary judgment must be denied. *See* Henry v. Gill Industries, Inc., 983 F.2d 943, 949-50 (9th Cir. 1993).

If, however, the moving party makes the initial showing, the burden then shifts to the nonmoving party to demonstrate that summary judgment is not appropriate. Celotex, 477 U.S. at 324. To make such a showing, "the nonmoving party must go beyond the

pleadings and . . . designate specific facts showing that there is a genuine issue for trial." FED. R. CIV. P. 56(e); Celotex, 477 U.S. at 324. A dispute is "genuine" only if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986).

At the summary judgment stage, it is not the function of the judge to weigh the evidence or make credibility determinations. Anderson 477 U.S. at 255. Rather, the judge should simply decide whether the evidence demonstrates a genuine factual dispute for trial. Id. at 250-251. When making such a determination, "the evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in [its] favor." Id. at 255.

B. Arbitrator's Decision

Plaintiff argues that the Arbitrator's written decision should not be admissible as evidence to this Court. (Pl.'s P. & A. at 7.) However, the decision of an arbitrator may be admitted as evidence and "accorded such weight as the court deems appropriate." Alexander v. Gardner-Denver Co., 94 S.Ct. 1011, 1025 n. 21 (1974); see also Vargas v. Gromko, 977 F. Supp. 996, 1002 (1997). In this case, the Arbitrator held a full and fair hearing on the merits on Plaintiffs case, and Plaintiff was an "active participant in presenting his side of the case." (Emer Decl., Ex. 3 at ¶ 4). The Arbitrator issued a detailed fifteen-page decision with thorough factual and legal analysis. The Court deems the Arbitrator's decision to be admissible evidence.

C. ADA Claim

Plaintiff argues that Defendant's actions constitute a violation of the ADA, 42 U.S.C. § 11211(8). Under

the ADA, as it applies to employment, a "qualified individual" with a disability is one "who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." Id.

1. Prima Facie Case

To prevail in an employment termination case, the plaintiff must show "(I) that [he] is a disabled person within the meaning of the ADA; (2) that [he] is qualified ... with or without reasonable accommodation ... to perform the essential functions of the job; and (3) that the employer terminated [him] because of [his] disability." Broussard v. Univ. of California at Berkeley, 192 F .3d 1252, 1255-56 (9th Cir. 1999); see Kennedy v. Applause, Inc., 90 F.3d 1477, 1481 (9th Cir. 1996) (citation and footnote omitted); ADA, § 102(a), 42 U.S.C.A. § 12112(a).

a. Was Plaintiff a Disabled Person within the Meaning of the ADA?

(i) Whether There Was a Disability

"In order to lay claim to the protections of the ADA, [the plaintiff] must first demonstrate that [he] is disabled within the meaning of the Act." Thompson v. Holy Family Hospital, 121 F.3d 537, 539 (9th Cir. 1997). Here, Plaintiff claims that he is disabled under the definition set forth in 42 U.S.C. § 12102(2)(C) - to be regarded as having a physical impairment that substantially limits a major life activity. 42 U.S.C. § 12102(2)(C). The Interpretive Guidelines of the EEOC, regulations mandated by the ADA to assist with the implementation of the federal legislation, consider "working" to be one of the "major life activities" covered by the ADA. See 29 C.F.R. § 1620.2(a); 29 C.F.R. Part 1630, App. § 29 C.F.R. § 1630.2(i) (1996).

Plaintiff argues that he has a physical impairment that "substantially limits" his major life activity of working. To establish such a limitation in the major life activity of working, EEOC regulations require that a plaintiff must demonstrate that he is "significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities." 29 C.F.R. § 1630.2(j)(3)(i). The "inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working." Id.

To support his argument, Plaintiff offers six declarations as exhibits. Whether Plaintiff has raised a genuine issue of material fact that he is substantially limited in working depends upon an evaluation of the merits of those exhibits.

(a) In a July 8, 1998 letter, Plaintiffs personal physician. Dr. Hoagland, stated that Plaintiff "has a long history of headaches which are often set off by fumes...I recommend that he work only in areas where he will not be exposed to fumes." (Sutton Decl. at Ex. 3.) Plaintiff contends that Dr. Hoagland's letter restricts him from working in a class of jobs; Plaintiff provides a list of examples, including painting, welding, auto mechanic, truck mechanic, etc. (Pl.'s P. & A. at 18.) However, the Court will not accept Plaintiffs conclusory determinations as proof of "substantial limitations." Dr. Hoagland's letter makes a mere recommendation; it does not demonstrate how Plaintiff's condition would preclude Plaintiff from working in an entire class of jobs.

(b) Dr. Donald J. Dalessio wrote a letter regarding Plaintiff's condition based on a January 6, 1999 visit. Dr. Dalessio stated that "I believe that the patient is disabled related to multiple chemical sensitivity-producing headaches as I have outlined."

(Emer Decl. Ex. 5 at 2.) Dr. Dalessio did not indicate whether he diagnosed Plaintiff as "disabled" within the confines of the ADA definition, and did not demonstrate how Plaintiff's condition precludes him from a broad class of jobs.

(c) After conducting a thorough examination of Plaintiff, Dr. Kaye H. Kilburn stated that "It is my expert opinion that the observations of triggering [headaches] by challenge with automobile exhaust exposure...justify the conclusion that a proof has been demonstrated." (Kilburn Decl., Ex. 1 at I.)[2] Under the heading "Extent of disability and work limitation," Dr. Kilburn concluded that "The avoidance of chemical triggers is essential to avoid headaches and disability." (Id.) However, Dr. Kilburn's determination that the headaches are triggered by exhaust does not address the crucial issue of Plaintiff's ability or inability to work in a broad class of jobs, and his statement fails to demonstrate that Plaintiff is disabled under the ADA.

(d) Vocational Rehabilitation Counselor Mark Remas determined that Plaintiff has a degree of disability of 29% of all occupations as a result of multiple chemical sensitivity. Mr. Remas based his determination on research conducted entirely by Plaintiff, which Mr. Remas "reviewed and replicated in kind" to conclude that "the restriction equaling 29 of jobs appears to be a valid degree of permanent disability." The Court sustains Defendant's objections to the Declaration of Mark Remas, based upon lack of personal knowledge under Federal Rule of Evidence 502 and improper opinion evidence by a lay person

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[2] The Court overrules Defendant's objections to the Declaration of Dr. Kaye Kilburn. See Defendant's Objections to Evidence at 4.

under Federal Rule of Evidence 701. (See Defendant's Objections to Evidence at 3-4.)

Furthermore, even if the Court were to admit this evidence, Mr. Remas' report does not compare the types of jobs Plaintiff could do before and after the onset of multiple chemical sensitivity. In addition, there is no indication of what time periods Mr. Remas was analyzing. See Broussard, 192 F.3d at 1258-59 (vocational specialist's analysis regarding whether Plaintiffs lifting limitation would "constitute a significant restriction on one's ability to lift, work, or perform any other major life activity," which included an examination of the plaintiffs job restrictions, an assessment of the positions which plaintiff could perform, and an inquiry into the availability of open positions in the relevant labor market of San Francisco, was insufficient to withstand a motion for summary judgment). Also, despite declaring that he considers himself "to be a vocational expert on the San Diego labor market," Mr. Remas did not himself describe which class of jobs Plaintiff is unable to perform. (Remas Decl., Ex. 1 at 6.) Rather, he "replicated the study steps" and concurred with the research conducted by Plaintiff, who is not a vocational expert. (Remas Decl., Ex. 1 at 7.) See Thornton v. McClatchy Newspapers, Inc., 261 F.3d 789 (9th Cir. 2001) (employee who failed to present evidence of jobs from which she was precluded and of relevant labor markets for that class of jobs failed to present a triable issue of material fact under the ADA). The Court finds that Mr. Remas' evaluation is insufficient to raise a genuine issue of material fact regarding whether Plaintiff is substantially impaired from working in a broad class of jobs.

(e) Plaintiff provided a "Severity of Disability Determination" from the State of California Department of Rehabilitation as evidence. (Enright

Decl. at Ex. 10.) This form categorizes Plaintiff as "severely disabled," and states that he will be provided 12 months of vocational rehabilitation services on or before June 30, 2000. However, the form does not state the nature or impact of Plaintiff's disability, and the Court cannot draw a legal conclusion from this form that Plaintiff is disabled under the ADA. Furthermore, because the form does not specify which types of vocational rehabilitation services are to be received, this form does not show how Plaintiff is precluded from working in a broad class of jobs.

(f) Plaintiff submitted a State of California Department of Rehabilitation Retraining Contract, approving Plaintiff for training at Coleman College to obtain his B.S. Degree in Computer Information Science. (Enright Decl., Ex. 11 at ¶ 21.) Plaintiff does not demonstrate how this evidence shows that he is substantially limited from working; rather, it demonstrates that Plaintiff is working to achieve a degree in his chosen field. See Sutton v. United Airlines, 527 U.S. 471, 492 (1999) ("if a host of different types of jobs are available, one is not precluded from a broad range of jobs.")

CONCLUSION

The Court finds that Plaintiff is not substantially limited in the major life activity of working, and that he is, thus, not disabled under the terms of the ADA. Therefore, the Court need not address the issue of whether Plaintiff was a qualified individual who could perform the essential functions of his job, with or without reasonable accommodation. The Court also need not address Plaintiffs claim that Defendant failed to engage in the interactive process, as required by regulation under the ADA. See Barnett v. U.S. Air, Inc., 228 F.3d 1105 (9th Cir. 2000); see also 29 C.F.R. § 1630.2(o)(3). Any failure by Defendant to engage in

an interactive process with Plaintiff is negated by the fact that he is not disabled under the terms of the ADA. Broussard, 192 F .3d at 1259.

Accordingly, the Court GRANTS Defendant's motion for summary judgment.

IT IS SO ORDERED.

/s/ NAPOLEON A. JONES, JR.
NAPOLEON A. JONES, JR.
United States District Judge

DATED: October 31, 2001

cc: All Parties

APPENDIX D

ARBITRATION PROCEEDING

In the Matter of the Arbitration

-between-

SOLAR TURBINES, The Employer,

-and-

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, District 94, Local Lodge 389 (IAM & AW) on behalf of Paul Enright, The Union and Grievant.

Re: Propriety of Medical Layoff and Failure to Recall

Joseph F. Gentile - Arbitrator CABarNo. 040180
[Case No. K380-m@-014-0299.Enright]
Decided March 29, 2001

OPINION AND AWARD OF THE ARBITRATOR

APPEARANCES:

For the IAW & AW :
David A. Rosenfeld, Esq., Van Broug, Weinberg, Roger & Rosenfeld, 180 Grand Avenue, Suite 1400, Oakland, CA 94612 [(510) 839-6600]

For Solar:

William H. Emer, Esq. and Ann Marie Zaletel, Esq., Riordan & McKinzie, 300 South Grand Avenue, 29th Floor, Los Angeles, CA 90071-3109 [(213) 629-4824]

STATEMENT OF THE MATTER

Solar Turbines (Solar) and the **International Association of Machinists and Aerospace Workers, District 94, Local Lodge 389** (Union) have a Collective Bargaining Agreement covering various job classifications, including that of a "Quality Test Technician" (QTT).

On April 21, 1997, **Paul Enright** (Grievant) was employed by Solar as a QTT in Department 380 of Solar's facilities known as the Kearney Mesa facility. As part of the pre-employment processes at Solar the Grievant completed an "Employee Medical Record" on April 11, 1997. The Grievant was also interviewed by Lee Thomas (Thomas), a Supervisor in Department 380. Thomas explained to the Grievant that QTTs work in different areas of the Kearney Mesa facility testing various products produced at Solar. He was also given a tour of the facility, including the Paint Shop and Department 379.

As already noted, the Grievant was hired. Subsequent to his employment as a QTT, the Grievant complained about migraine headaches and advised his Supervisor, Mohammad Karbasi (Karbasi), that his headaches were triggered by fumes.

Medical documentation was requested by Solar as to the Grievant's claimed medical problems. A note from the Grievant's personal physician, Daniel Hoagland, M.D, (Dr. Hoagland), stated the Grievant should avoid fumes, but that he was not barred by Dr. Hoagland from working around fumes. The name given to the Grievant's medical condition was

"Multiple Chemical Sensitivity." In effect, the Grievant experienced migraine headaches when exposed to dust, chemical fumes, exhaust fumes and metal fumes. Parenthetically, the "Physical Capabilities Form" for the QTT position indicated an employee in this job would be exposed to these very environmental conditions.

The Grievant's complaints continued and he ultimately informed Karbasi he could not work in the various locations where his QTT duties and tasks took him in the facility. The evidence record established that fumes are present throughout Solar's entire facility. The level and degrees may vary; however, fumes were indeed present. In testimony the Grievant acknowledged he could not work in any of the areas, but for the software trailer and at Sky Park.

The evidence record established there were fumes in these areas as well, though the level was less than other work site locations at the Kearney Mesa facility. Thus, Solar's management determined the Grievant had a permanent medical limitation and there were no jobs to which the Grievant could exercise displacement rights he was capable of performing within the medical limitations of his verified "Multiple Chemical Sensitivity." Therefore, in accord with the Letter of Understanding (LOU)* of the Collective Bargaining Agreement the Grievant was placed on layoff due to his physical inability to perform the available work. This action was taken on January 27, 1999.

The Grievant disagreed with this action and a grievance was filed on or about February 6, 1999, by the Union protesting the Grievant's placement on a medical layoff. The matter remained unresolved; thus,

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* LOU #2, "Medical Restrictions."

it came to arbitration before the undersigned on December 11 and 22, 2000 in San Diego, CA.

During the course of the hearing both sides were afforded a full and complete opportunity to be heard, examine and cross-examine witnesses, develop argument and present relevant evidence. An official transcript of the hearing was made by ASAP Court Reporting, Inc. All witnesses appearing before the Arbitrator were duly sworn. Final argument was reserved to Post--Hearing Briefs. These were timely submitted.

The Grievant attended the entire hearing and testified. He was fully and fairly represented by the Union. The Grievant was an active participant in presenting his side of the case.

ISSUE

Made a part of the evidence record in this case was a "Submission Agreement" which stated the precise issue for arbitral determination? it was to this effect; **"Did the Company violate the collective bargaining agreement or unlawfully discriminate against the grievant because of his alleged disability when it (a) placed him on medical layoff on or about January 27, 1999, and (b) failed to recall him thereafter? If so, what is the appropriate remedy"** [Joint Exhibit 2 (JX-1)]."

Parenthetically, also made a part of the record evidence was a Complaint ('00 CV 1842 J (LSP)] filed in the U.S. District Court, Southern District of California.

APPLICABLE PROVISIONS OF AGREEMENT

As the statement of the issue indicates, there are two components to this case: (1) a contract matter that rests on the interpretation and application of the

Agreement and, more specifically, **LOU 2** of the Agreement and (2) a statutory claim that rests on The Americans with Disabilities Act of 1990. (ADA) , as amended, **42 U.S.C. §12101 et seq.** and the EEOC Title I Regulations and Interpretative Appendix, as amended, **29 C.F.R. 1630 et seq.** with reference to the statutory claim, the core of this claim is the allegation Solar failed to reasonably accommodate to his disability, namely, "Multiple Chemical Sensitivity." This was expressed in the initial February 6, 1999 grievance filing.

Parenthetically, the contractual nexus which opened the jurisdictional door for the Arbitrator to address the statutory claim is Section **9-01(b)**. This provision states: **"[t]here shall be no discrimination by either party because of race, sex, age, disability, nationality, religious or political affiliation, union activity or any other basis protected by law"** [emphasis added]

The precise langauge found in the Agreement's LOU 2 relevant to the alleged contract violation is as follows:

> **"[I]t is understood between the parties that an employee who has a permanent medical limitation, which has been verified by objective medical evidence, shall be permitted to exercise displacement rights pursuant to Article X to any job he/she is capable of performing within the medical limitation. "In the event there is no job the employee can fill, then he/she will be placed on layoff due to physical inability to perform the available work. The employee will remain on the recall list in accordance with Article X, Sections 10.12 and 10.13."**

Section 10.12 mandates the time an employee on layoff status **"shall continue to accumulate seniority . . . provided they register with the Company"** and Section 10-13 delineates the "recall" procedures.

Though this case is not a discipline matter, there is a **"for cause"** standard in **Section 17.01. 17.01** further details the rights of management **to "assign work"** and effect employee status changes, such as **"transfer"** [p. 14, infra]

FACTUAL SUMMARY

The Grievant is a relatively short-term employee with Solar. His date of hire, as already noted, was April 21, 1997. His date of medical layoff was January 27, 1999.

Prior to the Grievant's employment at Solar, the Grievant testified he consulted Dr. Hoagland in May of 1996 [26: 15-16]* about his headaches and between August of 1996 and April of 1997 he continued to experience headaches [Id. 24]. The headaches were less frequent at some point during this timeframe [276].

In any event, when the Grievant applied for the QTT position at Solar, he neither voiced any objection about the different areas where he would be working or his ongoing headache problems nor voiced any objection to the work sites where he would be performing his QTT duties and tasks during the tour of the facilities. In simple terms the Grievant did not advise Solar that he had a history of headaches and neglected [whether "intentionally" or "inadvertently" is arguable] to inform Solar that he was not able to work around funes.

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* Legend: transcript of the hearing, page 26, lines 15-16. Same approach used throughout this Decision.

As already noted (p. 2, **supra**), the Grievant completed a "Medical Record Form." On this form, the Grievant marked the "no" box to this inquiry: "**[d]o you now have, or have you ever had any of the diseases or symptons listed below:** . . . headaches (frequent) . . ." Given the Grievant's own testimony, this answer was incorrect. However, the Grievant did note on the Form's Box 10 that he had consulted a physician "**within the past 10 years**" for four different matters including "headache[s]." This was truthful, though it was not fully forthcoming and somewhat misleading given the "no" answer noted ante.

Karbasi testified as to the difficulties which unfolded in assigning the Grievant to the various work sites where he would test various products produced by Solar. Parenthetically, some of these products were large. Though exposure to fumes was clearly identified on the QTT's "Physical Capabilities Form," the Grievant stated he could not work in these areas. He reaffirmed this in his testimony during this hearing. Parenthetically, Karbasi was a credible witness. The difficulties in assigning the Grievant reached the level that medical documentation was requested by Solar's management; thus, the Dr. Hoagland letter dated July 8, 1998 (p. 2, supra). Dr. Hoagland's handwritten letter (it is more aptly characterized as a "note") contained the following in full text:

> "**Paul Enright has a long history of headaches which are often set off [sic] by fumes, particularly from engine exhaust, painting and welding. I recommend that he work only in areas where he will not be exposed to fumes**" [emphasis added].

The emphasized language from Dr. "Hoagland's letter clearly established a limitation on the Grievant's ability to work. Solar maintained at the time and continued to maintain there were no vacant positions for which the Grievant was qualified that did not require exposure to some level of fumes. Notwithstanding this limitation, the Grievant testified he never missed any work resulting from migraine headaches caused by exposure to exhaust fumes or other substances [149:14; 150:1]. As previously noted (p. 3, **supra**), there were fumes in all of the areas, but, at the same time, the degree, extent and levels varied.

On December 10, 1998, the Grievant expressed in a written memorandum to management his desire to **"exercise my rights under the [ADA] because 1 am a person with a disability which is Multiple Chemical Sensitivity."** He requested **"reasonable accommodation"** and enumerated various areas for consideration by management. The Grievant appended Dr. Hoagland's note as medical substantiation for his claim of disability and reasonable accommodation as a consequence of his disability.

The Grievant was seen by Donald J. Dalessio, M.D. (Dr. Dalessio), a member of the medical staff at the Division of Neurology at Scripps Clinic Medical Group, on Janaury 6 1999. In Dr. Dalessio's medical report, his "impression" was stated in this manner. **"[h]eadache with migrainous features, associated with sensitivity to ordors."** His "comment and plan" provided in pertinent part **"that the patient [Grievant] be removed from those proximate areas, which may produce the headaches as described above. I believe that the patient is disabled related to multiple chemical sensitivity-producing headaches as I have outlined"** [emphasis in original].

Management effected the medical layoff procedures found in LOU 2 (p. 5, **supra**). A grievance was filed

protesting the propriety of this action on February 6, 1999 and this filing moved the issue into the grievance/arbitration procedures as found in **Article 7** of the Agreement.

The Grievant filed a concomitant charge with the U.S. Equal Employment Opportunity Commission (EEOC) on February 8, 1999. In essence, this filing also challenged the medical layoff linked to the fumes and further alleged a violation of the ADA because of the Grievant's claim he was discriminated against because of his disability.

The EEOC issued its determination which was a "Dismissal and Notice of Rights." This was dated June 20, 2000. In pertinent part the dismissal stated **"the EEOC is unable to conclude that the information obtained establishes violation of the statutes."** This determination was received into evidence; however, it was not found to be conclusive.

The Grievant raised the issue of his "Multiple Chemical Sensitivity" in another adjudicative forum, namely, California's Workers' Compensation system. This filing was made on February 8, 1999.

The above represents the factual context for this matter in an admittedly summary manner.

DISCUSSION

The issue statement asks whether Solar violated the Collective Bargaining Agreement or **"unlawfully discriminate against the Grievant because of his alleged disability"** in two different situations; (1) when the medical layoff was effected on Janaury 27, 1999 and (2) when the Grievant was not recalled thereafter.

With reference to the contract, LOU 2 is the operative provision. The Grievant had a permanent medical limitation which was verified by objective medical evidence (pp. 8 & 9, **supra**). Given this, LOU

2 mandates the Grievant be permitted to exercise displacement rights to a job he is capable of performing within the medical limitation.

The evidence record established all areas of Solar where QTTs perform their duties and tasks has fumes. The Grievant claimed the software trailer and at Sky Park he could work performing software testing. The evidence established these areas have some fumes as well, but admittedly at a reduced level. The difficulty, however, is that the evidence demonstrated the Grievant lacked the skills necessary to perform software testing, arguments to the contrary notwithstanding.

Therefore, pursuant to LOU 2, **"[i]n the event there is no job the employee can fill, then he/she will be placed on layoff due to the physical inability to perform the available work."** This is precisely what Solar's management did. Thus, no contractual violation of the Agreement can be found when the medical layoff was effected on January 27, 1999.

The second aspect of the medical layoff relates to external law, namely the ADA and the progeny of decisional law and regulations spawned by the ADA and argued from by the parties. *

To establish a prima facie case of disability discrimination under the ADA, it must be established the Grievant was "disabled" within the meaning of the ADA and that the the Grievant was otherwise qualified to perform the essential functions of the job, with or without reasonable accommodation and that the Grievant has suffered an otherwise adverse employment decision as a result of his disability. The

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* A host of statutory, regulatory and decisional law was presented in argument. It was fully considered, though not expressly cited in the text of this Decision.

words "disability" and "qualified" are words-of-art within the ADA.

The evidence established the Grievant has "Multiple Chemical Sensitivity." Whether this constitutes a disability within the meaning of the ADA is certainly arguable.

Applying the statutory, regulatory and decisional law standards to the facts in the instant case, the Arbitrator concluded the Grievant was not "disabled" as defined in this authority. The evidence record established the Grievant was not substantially limited in his ability to perform any major life activity. Admittedly, the Grievant claimed he could not work in almost all areas where QTTs worked, but for the two previously identified. And, as already noted, these two areas are questionable and it has already been concluded the Grievant lacked the skills to perform the software testing. (p. 11, **supra**). Further, the Grievant's inability to work in a particular building does not constitute a substantial impairment in the major life activity of working.

To claim the statutory right to reasonable accommodation, the Grievant must first demonstrate he satisfied the threshold criteria of a statutory "disability." As just noted, the evidence was simply insufficient to meet these criteria. The written comments by Drs. Hoagland and Dalessio were insufficient to establish that the Grievant was substantially limited in the major life activity of working.

With reference to the "qualified" component in the statutory scheme of the ADA, the Grievant has not established he can perform the essential functions of his position, with or without reasonable accommodation. It was clear from this evidence record that QTTs were to travel to various departments throughout the facility, including

Department 379 and the Paint Shop, to perform the product testing. This was indeed an essential job function of the QTT position and one which the Grievant could not perform. The Grievant was aware of this at the time of his initial employment.

Assuming arguendo the Grievant was a "qualified individual with a disability," the evidence record established, as has already been stated, fumes are present throughout the Solar facility. In testimony, the Grievant steadfastly maintained he could not work in an area exposed to fumes [160:20-24]. The only area the Grievant testified he could work was the software testing area at Sky Park; however, the Grievant testified be had never been to this area [163:22]. There was testimony there were some fumes in this area too.

Therefore, Solar was correct when it argued "the Grievant cannot be reasonably accommodated" [Solar Biref, p. 19]. Again, this assumes arguendo the Grievant had met the requirements that would call for reasonable accommodation.

Thus, as to the second component of the first issue, the Arbitrator can not find that the Grievant was "unlawfully discriminated against" because of having "Multiple Chemical Sensitivity."

This brings the Arbitrator to the second issue, namely, whether management acted improperly when the Grievant was not recalled.

The evidence established, namely the time records, that software testing was done since the time the Grievant was placed on the medical layoff status at issue in this case. The difficultly with this evidence was that it did not reveal where in the facility the testing was performed; however, Ron Stoneman (Stoneman) , a long-term employee with Solar and a Principal Test Engineer working in Control Systems, testified that 80 to 90 percent of the software testing

took place in the trailer when it became available [255]. There was also software testing in Departments 378 and 380 [250] ; however, as the Grievant testified, he could not perform software testing on the floor of these two departments [161:3-16].

Stoneman further testified that it would take six months to a year for a person to **"become fairly productive at software testing"** [249:17]; however, this would depend on the individual. He further testified the **"control software for industrial type purposes"** is not taught in schools and is learned through on-the-job training [250].

Stoneman was a very persuasive witness. As already noted, the Grievant was not qualified to perform software testing in the software trailer or at Sky Park. The evidence record established that during some of the time the Grievant has been on medical layoff, less senior employees have performed software testing; however, the evidence record was insufficient to show the Grievant should have been recalled given the locations, experience levels and the application of **Section 17.01** (p. 6, **supra**).

Therefore, the Arbitrator can not find either a contractual or statutory violation in the fact the Grievant was not recalled following his medical layoff.

Credibility did have an impact on the above findings and conclusions. With reference to credibility, the Grievant's credibility was clouded given the absence of candor and straightforwardness during his pre-employment with Solar (pp. 6 & 7, supra).

AWARD

Having been duly selected to serve as the Arbitrator in this matter and having carefully reviewed the evidence record as a whole, the evidence supports the ultimate decision that the issue as framed (p. 4, **supra**) must be answered with a **"no" -- thus, Solar**

did not violate the Collective Bargaining Agreement or unlawfully discriminate against the Grievant, Paul Enright, when it (a) placed him on medical layoff on or about January 27, 1999, and (b) failed to recall him thereafter! Therefore, the grievance is **DENIED** and the claims **DISMISSED.**

Respectfully submitted,
/s/ Joseph F. Gentile
Joseph F. Gentile

Arbitrator

March. 29, 2001
Los Angeles, CA
[0103031]

APPENDIX E

RELEVANT STATUTES, REGULATIONS AND EEOC INTERPRETIVE GUIDANCE

1. Americans with Disabilities Act, 42 U.S.C. § 12101, et seq.

§ 12102. Definitions

As used in this subchapter. * * *

(2) Disability

The term "disability" means, with respect to an individual –

(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;
(B) a record of such an impairment; or
(C) being regarded as having such an impairment.
* * *

§ 12111. Definitions

As used in this subchapter. * * *

(8) Qualified individual with a disability

The term "qualified individual with a disability" means an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires. For the purposes of this subchapter, consideration shall be given to the employer's judgment as to what functions of a job are essential, and if an employer has prepared a written description before advertising or interviewing applicants for the job, this description shall be

considered evidence of the essential functions of the job.

§ 12112. Discrimination

(a) General Rule

No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employee compensation, job training, and other terms, conditions, and privileges of employment.
* * *

2. ADA Regulations, 29 C.F.R. Part 1630

[Code of Federal Regulations]
[Title 29, Volume 4]
[Revised as of July 1, 2002]
From the U.S. Government Printing Office via GPO Access
[CITE: 29CFR1630.2]
[Website : http://www.access.gpo.gov/]

[Page 339-342]

§ 1630.2 Definitions.

* * *

(g) Disability means, with respect to an individual--
(1) A physical or mental impairment that substantially limits one or more of the major life activities of such individual;
(2) A record of such an impairment; or
(3) Being regarded as having such an impairment.

(See Sec. 1630.3 for exceptions to this definition).

(h) Physical or mental impairment means:

(1) Any physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genito-urinary, hemic and lymphatic, skin, and endocrine; or

(2) Any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

(i) Major Life Activities means functions such as caring for oneself, performing manual tasks, walking, seeing,

[[Page 340]]

hearing, speaking, breathing, learning, and working.

(j) Substantially limits--(1) The term substantially limits means:

(i) Unable to perform a major life activity that the average person in the general population can perform; or

(ii) Significantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life activity.

(2) The following factors should be considered in determining whether an individual is substantially limited in a major life activity:

(i) The nature and severity of the impairment;

(ii) The duration or expected duration of the impairment; and

(iii) The permanent or long term impact, or the expected permanent or long term impact of or resulting from the impairment.

(3) With respect to the major life activity of working-

(i) The term substantially limits means significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities. The inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working.

(ii) In addition to the factors listed in paragraph (j)(2) of this section, the following factors may be considered in determining whether an individual is substantially limited in the major life activity of "working":

(A) The geographical area to which the individual has reasonable access;

(B) The job from which the individual has been disqualified because of an impairment, and the number and types of jobs utilizing similar training, knowledge, skills or abilities, within that geographical area, from which the individual is also disqualified because of the impairment (class of jobs); and/or

(C) The job from which the individual has been disqualified because of an impairment, and the number and types of other jobs not utilizing similar training, knowledge, skills or abilities, within that geographical area, from which the individual is also disqualified because of the impairment (broad range of jobs in various classes).

(k) Has a record of such impairment means has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities.

(l) Is regarded as having such an impairment means:

(1) Has a physical or mental impairment that does not substantially limit major life activities but is treated by a covered entity as constituting such limitation;

(2) Has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment; or

(3) Has none of the impairments defined in paragraph (h) (1) or (2) of this section but is treated by a covered entity as having a substantially limiting impairment.

3. Section 902 Definition of the Term Disability

[Interpretive Guidance on Title I of the Americans with Disabilities Act (ADA) by the EEOC]

The U.S. Equal Employment Opportunity Commission
[http://www.eeoc.gov/docs/902cm.html#addendum]
[Last Modified Feb. 1, 2000]

ADDENDUM

Since the Compliance Manual Section on the Definition of the Term "Disability" was published, the Supreme Court has ruled that the determination of whether a person has an ADA "disability" must take into consideration whether the person is substantially limited in performing a major life activity when using a mitigating measure. This means that if a person has little or no difficulty performing any major life activity because s/he uses a mitigating measure, then that person will not meet the ADA's first definition of "disability." The Supreme Court's rulings were in Sutton v. United Airlines, Inc., 527 U.S. ____ (1999), and Murphy v. United Parcel Service, Inc., 527 U.S. (1999).

As a result of the Supreme Court's ruling, this document's guidance on mitigating measures is superseded. Following the Supreme Court's ruling, whether a person has an ADA "disability" is determined by taking into account the positive and negative effects of mitigating measures used by the individual. The Supreme Court's ruling does not change anything else in this document. The superseded guidance is found in:

Section 902.2, endnote 5

Section 902.2(e)

Section 902.4, endnote 20

Section 902.4(c)(2)

Section 902.5.

For more information on the Supreme Court rulings and their impact on determining whether specific individuals meet the definition of "disability," consult the Instructions for Field Offices: Analyzing ADA Charges After Supreme Court Decisions Addressing "Disability" and "Qualified," which can be found on EEOC's website at www.eeoc.gov. * * *

902.4 Substantially Limits

* * *

(c)(2) Substantial Limitation of Major Life Activity of Working -- As noted previously, supra, one need not determine whether an impairment substantially limits an individual's ability to work if the impairment substantially limits another major life activity. If the individual is not substantially limited with respect to any other major life activity, then one

should consider whether the individual is substantially limited in working.

The Commission has provided regulatory guidance for determining whether an impairment substantially limits an individual in the major life activity of working. The regulation states,

(3) With respect to the major life activity of working--

(i) The term substantially limits means significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities. The inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working.

(ii) In addition to the factors listed in paragraph (j)(2) of this section, the following factors may be considered in determining whether an individual is substantially limited in the major life activity of "working":

(A) The geographical area to which the individual has reasonable access;

(B) The job from which the individual has been disqualified because of an impairment, and the number and types of jobs utilizing similar training, knowledge, skills or abilities, within that geographical area, from which the individual is also disqualified because of the impairment (class of jobs); and/or

(C) The job from which the individual has been disqualified because of an impairment, and the number and types of other jobs not utilizing

similar training, knowledge, skills or abilities, within that geographical area, from which the individual is also disqualified because of the impairment (broad range of jobs in various classes).

29 C.F.R. § 1630.2(j)(3) (emphasis in the original).

As the regulation makes clear, an impairment that prevents an individual from working at one particular job, because of circumstances or materials unique to that job, does not substantially limit that individual's ability to work. See House Judiciary Report at 29. A person is not substantially limited in the ability to work simply because (s)he cannot perform one particular job for one particular employer. See E.E. Black, Ltd. v. Marshall, 497 F. Supp. 1088, 1099, 24 EPD Par. 31,260 at 17,650, 1 AD Cas. (BNA) 220, 229 (D. Hawaii 1980). Rather, an individual is substantially limited in working if (s)he is prevented or significantly restricted (when compared to the average person having similar qualifications) from performing a class of jobs or a wide range of various jobs. See id.; see also 29 C.F.R. § 1630.2(j)(3).

In E.E. Black, an apprentice carpenter was denied employment after a preemployment physical examination disclosed a congenital back anomaly. The court held that the term "substantial limitation" means more than an inability to perform one particular job but less than a general inability to work. It suggested that the evaluation of whether an individual is substantially limited in working focus on such factors as the number and type of jobs from which the individual is disqualified and the geographical area to which the individual has reasonable access. 497 F. Supp. at 1099-1101, 24 EPD at 17, 650-52, 1 AD Cas. at 229-30.

These criteria, when read together, indicate that an impairment is a substantial limitation to working if it disqualifies an individual from a class of jobs or a broad range of jobs in various classes. For example, a charging party is substantially limited in working if (s)he has a back impairment that precludes him/her from heavy lifting and, therefore, from the class of heavy labor jobs. See 497 F. Supp. at 1102, 24 EPD at 17,652, 1 AD Cas. at 231. Conversely, a postal clerk with a mild case of crossed eyes that caused him to develop eye strain and headaches after operating a particular machine that required detailed eye work was not substantially limited in working.
Jasany v. United States Postal Service, 755 P.2d 1244, 1250, 36 EPD Par. 35,070 at 36,835, 1 AD Cas. (BNA) 706, 710 (6th Cir. 1985). Unlike the charging party in the first example, this complainant did not have an impairment that precluded him from performing any other job or duty within a class of jobs. In fact, the parties agreed that his impairment had not affected his past work history or his ability to perform other duties at the post office. Id. The impairment had limited only his ability to perform this one particular job and perhaps a narrow range of like jobs. For the same reason, an individual whose vision impairment and high-tone hearing loss disqualified him from a position as a detention deputy but did not disqualify him from other positions (e.g., corrections officer) was not substantially limited in working. See State v. Hennepin County, 441 N.W.2d 106, 51 EPD Par. 39,383, 1 AD Cas. (BNA) 1490 (Minn. 1989) (applying state law with same definition of "disability").

Example 1 -- CP is a computer programmer. She develops a vision impairment that does not substantially limit her ability to see but does prevent her from distinguishing characters on computer

screens (without reasonable accommodation). As a result, she cannot perform any work that requires her to read characters on computer screens. Her vision impairment prevents her from working as a computer programmer, a systems analyst, a computer instructor, and a computer operator. CP is substantially limited in working because her impairment prevents her from working in the class of jobs requiring use of a computer.

Example 2 -- Same as Example 1, above, except CPs vision impairment does not interfere with her ability to distinguish characters on most computer screens. It does prevent her, however, from distinguishing characters on the peculiar type of computer screens that R uses. Although CP cannot work with the unique screens that R uses, she can work with other computer screens. CP, therefore, is not substantially limited in working. Her impairment prevents her from being a computer programmer for one particular employer (R), but it does not prevent her from performing similar jobs for other employers.

Impairments that preclude an individual from performing a broad range of jobs in various classes also may substantially limit the major life activity of working. For example, an individual could be substantially limited in working if (s)he has severe allergy to a substance found in many high-rise office buildings. If the allergy prevents the individual from working in many of the high-rise office buildings in the geographical area to which the individual has reasonable access, then the individual is substantially limited in working. This is so because a great number of positions within many classes of jobs would be performed in those buildings. 29 C.F.R. pt. 1630 app. § 1630.2(j).

By contrast, a severe allergy to the peculiar type or amount of dust found within one office is not an impairment that substantially limits the ability to work. Wright v. Tisch, 45 Fair Empl. Prac. Cas. (BNA) 151, 1 AD Cas. (BNA) 1157 (E.D. Va. 1987). In Wright, the court determined that a complainant's inability to tolerate the dusty environment in the unit where she worked did not constitute a disability. 45 Fair Empl. Prac. Cas. at 152-53, 1 AD Cas. at 1158. The court noted that none of the complainant's other work activities was affected by her allergy. 45 Fair Empl. Prac. Cas. at 152, 1 AD Cas. at 1158. It also noted that the complainant's allergy did not restrict her from working in other offices with dust and that she had, in fact, worked in the presence of dust in other offices within the agency. Id.

Example 1 -- CP has a hearing impairment that only mildly affects his ability to hear. The impairment, however, makes CP extremely sensitive to very loud noises. CP experiences severe pain when he is exposed to loud noises for more than a brief period. Because of this sensitivity, CP cannot work in environments where noise levels routinely exceed a certain decibel level. As a result, R refused to hire CP for a welder's position. Further, CP could not work in carpentry or auto repair shops and could not be a heavy equipment operator, a demolitions expert, or a member of an airport ground crew. CP's impairment, therefore, prevents CP from working in a broad range of jobs in various classes. Accordingly, CP has an impairment that substantially limits his ability to work.

Example 2 -- CP has a hearing impairment that does not significantly restrict his ability to hear but does make him very sensitive to sound at one particular pitch. CP works on an assembly line at an

automobile plant in an area that has several such plants. His employer has installed a new conveyor belt that has a unique whistle that sounds approximately every ten minutes, every time the conveyor belt stops and starts. CP experiences severe pain in his ears whenever the whistle sounds. As a result, CP can no longer work at that plant. CP's impairment, however, does not substantially limit his ability to work. Although the impairment prevents him from performing this particular job for this particular employer, it does not prevent him from performing similar jobs for other employers in his geographical area.

Example 3 -- CP has an impairment that requires radiation therapy, which results in an abnormal rate or degree of exhaustion. CP becomes very tired very easily and cannot engage in continuous activity for long periods. Assume that CP's impairment does not substantially limit her ability to perform any major life activity other than working. As a result of the impairment, however, CP cannot work more than four hours per day. This prevents CP from working in all jobs requiring full-time work. Since those jobs constitute a wide range of jobs in various classes, CP is substantially limited in working. (A reasonable accommodation of a part-time or modified work schedule might enable CP to work in a number of jobs from which she otherwise would be excluded. When determining whether an impairment is substantially limiting, however, one does not consider the ameliorative effects of reasonable accommodation or other mitigating measures. See § 902.5, infra.)

As the Commission's regulation notes, a number of factors may help to determine whether an individual is substantially limited in working, 29 C.F.R. § 1630.2(j)(3)(ii). Although a showing with respect to

each factor is not a required element of proof, information relating to the factors is relevant to whether an individual is significantly restricted in the ability to perform a class of jobs or a broad range of jobs in various classes. Thus, information about the geographical area to which an individual has access and the number and types of jobs from which an individual is disqualified because of his/her impairment may be considered when determining whether an impairment substantially limits the individual's ability to work. See id.

The reference to the "number and types" of jobs is not meant to require an onerous evidentiary showing. 29 C.F.R. pt. 1630 app. § 1630.2(j). The reference does not mean that an individual must identify the exact number of jobs using similar or dissimilar skills in a certain geographic area. Further, the reference does not mean that an individual must count positions or otherwise present a precise number of jobs from which (s)he is disqualified because of an impairment. Instead, the reference to the "number and types" of jobs "only require(s] the presentation of evidence of general employment demographics and/or of recognized occupational classifications that indicate the approximate number of jobs (e.g., 'few,' 'many,' 'most') from which an individual would be excluded because of an impairment." Id. Furthermore, in cases where it is clear that an individual is excluded from a class of jobs or a broad range of jobs in various classes, only minimal evidence will be required.

An assessment of whether an impairment substantially limits an individual's ability to work focuses on whether the individual is significantly restricted in the ability to perform a class of jobs or a broad range of jobs in various classes as compared to

the average person having comparable training, skills, and abilities. 29 C.F.R. § 1630.2(j)(3)(i). For example, suppose that an individual has an impairment that interferes with his/her ability to work in the class of clerical jobs. The individual is substantially limited in working if (s)he is significantly restricted in performing clerical work as compared to the average person having comparable clerical skills. Thus, if the individual has clerical skills and training and the impairment prevents him/her from performing many of the clerical jobs that the average person with comparable clerical skills can perform, then the individual is substantially limited in working. On the other hand, if the individual wants to work as a clerk but has no clerical skills or training, then (s)he is substantially limited in working only if the impairment significantly restricts his/her ability to work in the clerical class as compared to the ability of the average person with a similar lack of clerical skills. (It is likely in that case that the average person with a lack of clerical skills can perform only a limited number of clerical jobs and that the individual is not significantly restricted when compared to the average person.)

The investigator often can begin to obtain information relevant to a determination of whether the charging party's impairment, significantly restricts his/her ability to perform either a class of jobs or a broad range of jobs in various classes from: a position description of the job at issue, the respondent's explanation of the requirements of the job, and the charging party's description of his/her qualifications and his/her experience in similar positions. This information, which helps to identify the skills relevant to the job, may be useful in identifying other jobs using similar or dissimilar skills. In addition, the investigator should attempt to

determine the number and types of jobs in the geographical area from which the charging party is disqualified because of the impairment. Information about other jobs where the charging party has worked, or for which the charging party has or has not applied, may be relevant to this inquiry. For example, other employers may have refused to employ the charging party because of his/her impairment, or the charging party may not have applied for certain jobs because the impairment disqualified him/her from those jobs. Similarly, an employment agency or an employment counselor may have told the charging party that the impairment prevents him/her from working in certain jobs. On the other hand, the fact that the charging party performed certain jobs successfully may indicate that the impairment -- if it existed at the time that the charging party performed those jobs -- does not disqualify him/her from that type of work. [Footnote] 21 * * *

[Footnote] 21. If the charging party does not have an impairment that substantially limits his or her ability to work (or to perform any other major life activity), then the investigator should determine whether the charging party has a record of such an impairment (see § 902.7, infra) or is regarded as having such an impairment (see § 902.8, infra). An individual who in fact does not have an impairment that substantially limits the major life activity of working nonetheless may be regarded as having such an impairment (see § 902.8(f), infra).

APPENDIX F

MEDICAL LETTER WITH SUPPLEMENT BY DR. KILBURN FOR CONSULTATION WITH MR. ENRIGHT ON APRIL 19, 1999 [C.A. ER 125-132]

May 4, 1999

Mr. Paul C. Enright
1194 Greenfield Drive
El Cajon. CA 92021

RE: Paul C. Enright
Age/Ed Level years 41/14

Dear Mr. Enright:

You were seen on April 19, 1999, at the Neuro-Test, Inc., in Pasadena, California. You were pleasant and cooperative with all parts of the examination and testing and answered all questions appropriately.

Occupational History:

Previously employed at Solar Turbines, exposed to exhaust gases.

Exposure History:

Specific chemicals have served as triggers, particular diesel and gasoline engine exhaust. Now triggered by perfume incense, charcoal grill fumes and cigarette smoke, also turbo soap. Indoor office environments are noted as adverse. No pesticide or termiticide exposures are known.

Chief Complaints:

1. "Migraine" headaches

2. Trouble concentrating

Medical History:

- Usual childhood diseases.

Current Medications: None

Smoking History: Never smoked

Symptom Frequency Score:

Equals 2.4 (compared to a normal score of 2.5) which is not elevated.

Review of Systems:

General	light-headedness, headache, dizziness, fatigue
HEENT	dryness of mouth/throat, throat irritation, eye irritation
Cardio/Resp	nausea, indigestion; occasional chest tightness and pain
Gasto Intestinal	occasional loss of appetite
Neuro	somnolence, insomnia, irritability, lack of concentration,. difficulty with recent and long-term memory, decreased libido, diminished alcohol tolerance; occasional instability of mood
Genitourinary	none
Psychiatric	none

Physical Examination:

Ht 75.5 in. Wt 228 lbs, P 58, BP 136/97, RR 14
A well developed, well nourished man in no acute distress.

Skin	normal, no lesions, mucous membranes moist and well hydrated, no cyanosis
Head	no deformities
Nose	no pus, no ulceration
Mouth	normal dentition, no erythema or exudate in pharynx
Ears	tympanic membranes normal
Eyes	pupils symmetrical, round reactive equally to light and accommodation, fundus: normal disc and vessels
Neck	supple, no masses
Lymphatics	no nodes palpable
Chest	normal configuration, no masses or gynecomastia
Lungs	normal breathing, moves air well, breath sounds normal and of normal duration, no adventitial sounds
Heart	apex at midclavicular line, 5th intercostal space, regular rhythm, normal heart sounds, no murmurs, clicks or rubs
Abdomen	soft-non-distended; no organomegaly or masses; non-tender on palpation
Back	non-tender, no CVA tenderness
Extremities	no clubbing or pedal edema; no varicoslties or deformities; joints mobile, normal pulses
Rectal	not done
Face-	normal smell, ocular movements,
Cranial Nerves	touch, expression, taste, gag, speech, neck muscle strength and tongue protrusion

Neuro	reflexes active and symmetrical 2+, muscle strength normal and symmetrical, sensation grossly intact
Vibration	normal
Deep Tendon	reflexes normal
Cerebellar Signs	normal stance and gait; normal no past-pointing

Pulmonary Function Tests Interpretation:
(See table)

Normal spirometry.

Name; Paul Enright Date of Examination: 4-19-99
Age: 41 Ed. Levels 14 Ht: 75.5 in Wt: 228 lbs
Sex: Male

Test	Observed	Predicted	Limit	Abn
NEUROPHYSIOLGICAL				
Simple Reaction Time (ms)	283	275.88	371.29	
Choice Reaction Time (ms)	497	489.30	620.17	
Sway-Balance (cm/sec) Eyes Open	.84	.69	.92	
Sway-Balance (cm/sec) Eyes Close	1.11	1.15	1.67	
Blink Reflex R				
Blink Reflex L				
Grip Strength (kg) R				
Grip Strength (kg) L				
Color Vision R				
Color Vision L				
Visual Fields Performance R				
Visual Fields Performance L				
Hearing R				
Hearing L				
Vibration				

COGNITIVE FUNCTION			
Culture Fair Score			
Vocabulary Score			
Digit Symbol Score	57	55.43	41.38
RECALL			
Verbal Recall (Immediate)			
Verbal Recall (Delayed)			
Rey 15 Figures			
PERCEPTUAL MOTOR SPEED			
Pegboard, Dominant (sec)	70	68.51	86.24
Trails A (sec)	30	29.64	45.12
Trails B (sec)	46	66.65	109.35
Finger Writing Errors R			
Finger Writing Errors L			
LONG-TERM OR CRYSTALLIZED MEMORY			
Information			
Picture Completion			
Similarities			
AFFECTIVE STATUS			
Profile Of Mood States	0		50
Tension			
Depression			
Anger			
Vigor			
Fatigue.			
Confusion			
Symptom Frequency			
Beck's Depression Scale			
Limbic System Checklist			
PULMONARY FUNCTION			
FVC			
FEV1			
F 25-75			
F 75-85			
FEV1/FVC			

Total Neurological abnormal: 0

Neurophysiological Tests:

- Simple reaction time is normal.
- Choice reaction time is normal.
- Balance measured by sway speed with eyes open is normal.
  With eyes closed, sway speed is normal.
- Blink reflex latency is normal.
- Grip strength is normal.
- Color vision by the Lanthony discrimination test was normal.
- Visual fields with the Humphrey apparatus are normal.
- Vibration is normal.
- Hearing is normal.

Neuropsychological Tests:

Cognitive Function Domain

- Culture Fair score is normal.
- Digit symbol score is normal.

Recall Domain

- Recall of the stories 1 and 2 normal.
- Rey 15 figures is normal.

Perceptual Motor Speed

- Pegboard performance time is normal.
- Trail making A and trail making B performance normal.
- Finger writing errors normal

Long-term or Crystallized Memory Domain

- Information is normal.
- Picture completion is normal.
- Similarities is normal
- Standard vocabulary performance is normal.

Affective Status:

- POMS Score equals 33 which is normal.
- Beck's Depression Inventory equals 4 (compared to a normal score of 6) which is normal.
- LSCL-33 score equals 26 which is normal.

Squires Memory Inventory:

Self reported ability to recall is diminished for most inquiries.

Diagnoses:

1. Chemical encephalopathy

2. Adverse cerebrovascular and neurobehavioral effects of auto exhaust exposure.

Summary and Conclusions:

At 4:50 PM exposed in closed garage (3 car) to diesel exhaust (1987 MB) for 1 minute. I noted slight eye irritation. Paul smelted diesel. He filled out POMS fro 4:53 to 5:00.

At 5:00 PM used gas engine exhaust - MB87 - shifted to Chevrolet in garage for 3 minutes.

Headache started within 10 minutes, created at 25 minutes, as 8 on a scale of 10.

Began testing at 5:30 PM.

w = worse **B** = better = unchanged

Balance, eyes open	0.62 to 0.84	35%	w
eyes closed	1.00 to 1.11	11%	w
Simple Reaction Time	213 to 283	34%	w

Choice Reaction Time	424 to 497	18%	w
Digit Symbol	61/0 to 57/1	7%	w
Pegboard time	75/0 to 70/1		B
Trails A	30/2 to 30/0		=
Trails B	57 to 46/1		B

This represents a positive challenge response to exhaust fumes. The balance and reaction time are significant changes. The testing of peg placement and trails reflects the expected improvement with prior presentation. Therefore, this is evidence that along with onset of headache described as migraine there are adverse neurobehavioral effects.

There is no magic bullet for this illness but it must be managed by you, by policy of avoidance, diary keeping to isolate specific irritants and attention to what areas of your activities produce irritation versus which produce a pleasant and livable sensation versus those which are in a sense neutral. You must then diminish the noxious ones and increase the pleasant ones. This usually means making different indoor air exposure arrangements. Also, ingestion of alcohol is adverse. Similarly the use of many detergents and insect sprays (insecticides) are all adverse.

You may want to try sweating induced by sauna or hot tub with proper care to avoid dehydration which means drinking plenty of water and Gatorade when engaging in these activities. It doesn't really matter how sweating is induced. It could be dry heat, wet heat or exercise. Rest when efficiency begins to drop. Eyes closed, dark room with or without classical

(organized) music. Break the day into a series of work sessions of an hour or two.

This expert opinion is rendered to the standard of more probable than not.

Sincerely yours,

/s/ Kaye H. Kilburn
Kaye H. Kilburn M.D.
Ralph Edgington Professor of Medicine

KHK:jg

Supplement to report of April 19, 1999

History

Migraine type headaches began about 3 years ago. Headaches caused 2 to 5 days of disability. Employment at Solar Turbines began April 21, 1997. About 1 year later, Mr. Enright noted that headaches were being triggered by fumes from diesel exhaust, together with propane fumes. By chance his work was relocated in temporarily in a trailer for 3 to 4 weeks and he was free of headaches for 2 weeks.
He was put back into building 20 and had headaches recur when exposed to diesel fumes. At this time he noted exposure to propane exhaust triggered headaches. Subsequently, he has found many chemicals and chemical mixtures trigger headaches. These include perfume, incense, hair spray, gasoline fumes, paint, diesel exhaust, propane exhaust, welding fumes, engine exhaust, turbo soap, restroom cleaning chemicals, new carpeting, tar and asphalt fumes, chimney smoke and charcoal grill fumes. Most are combustion products.

Cause of injury

The history of association to inhaling fuel exhaust at work is clear. I exposed Mr. Enright to automobile exhaust on April 19, 1999 and measured significant worsening of balance and reaction time. Such worsening is unlikely due to chance and appear definitely to be caused by engine exhaust gases.

Extent of disability and work limitation

The avoidance of chemical triggers is essential to avoid headaches and disability.

This condition is permanent, whether it will worsen in time is not predictable. In my experience with diesel exhaust exposure, the impairment was permanent and progressive. This may apply to headaches but I am better able to give an opinion that in the absence of exposure it will be stationary.

It is my expert opinion that the observations of triggering by challenge with automobile exhaust, as related to diesel and other fossil fuel justify the conclusion that a proof has been demonstrated. In short, there is objective evidence, as summarized in the table on page 8, that adverse effects were measured after exposure. This confirms the subjective observations made by Mr. Enright and summarized by his physicians including me.

Sincerely,

/s/ Kaye H. Kilburn
Kaye H. Kilburn M.D.
Ralph Edgington Professor of Medicine

University of Southern California
School of Medicine
2025 Zonal Avenue
CSC 201
Los Angeles, California 90033
Tel: 323 442 1830
Fax: 323 442 1833

APPENDIX G

STATE OF CALIFORIA DEPARTMENT OF REHABILATION SEVERITY OF DISABILITY DETERMINATION FOR PAUL ENRIGHT [C.A. ER 174-175]

STATE OF CALIFORIA
DEPARTMENT OF REHABILITATION

SEVERITY OF DISABILITY DETERMINATION

DR 213 (Regs/Rev. 05/99)

Applicant Name
ENRIGHT, PAUL

Counselor Name
DYER, GEORGE E.

Social Security Number
558-98-5830

The severity of disability determination is based on an assessment of your disabilities and their impact on 10 areas of functional capacity, the number of vocational rehabilitation services you require, and the estimated time required to complete your vocational rehabilitation. The severity of disability determination is used with your date of application to establish a priority category. Your placement in a priority category determines the order in which you will be served. An explanation of priority category is contained on page 2.

PRIORITY CATEGORY

Level of Severity of Disability S
MS = Most Severe S = Severe D = Disabled

Application Date : 12/09/1999

The following information was used to determine your level of Severity of Disability:

Significance Scale Scores by Functional Capacity Area:

1 Mobility	0 Speaking
0 Hearing	0 Seeing
0 Cognitive Processing	0 Personal Care
0 Self-Direction	0 Interpersonal Care
4 Work Tolerance	3 Work Skills

2 Estimated Number of Vocational Rehabilitation Services Required
12 Estimated Months to Complete Vocational Rehabilitation Services

The Department of Rehabilitation is operating under an Order of Selection whereby eligible individuals receive vocational rehabilitation services based on their priority category.

You may request a re-evaluation of your priority category placement if you believe your situation has changed sufficiently to place you in a different priority category.

XX You will be provided vocational rehabilitation services.

___ We are currently unable to serve you. You have been placed on a waiting list and will be contacted every 90 days and informed of, among other things, your priority category and the priority category being served. Your appeal rights are explained on the attached form DR 1000.

PRIORITY CATEGORY CURRENTLY BEING SERVED

Level of Severity of Disability		**Application Date On or Before**
Most Severely Disabled	YES	ALL
Severely Disabled	YES	06/30/2000
Disabled	NO	N/A

PRIORITY CATEGORY

The priority category is established:

First: Based on an individual's level of severity of disability.

(Level of severity of disability means disabled, severely disabled or most severly disabled. A priority category including individuals who are severely disabled will not be opened until the Department has sufficient resources to serve all eligible individuals who are most severely disabled, regardless of application date. A priority category including individuals who are disabled will not be opened until the Department has sufficient resources to serve all eligible individuals who are most severely disabled or severely disabled, regardless of application date.)

Second: Based on the date of the application.

Your signature indicates that you have received this form.

Your Signature: /s/ Paul Enright Date 2-14-00

Authorized Rep/Parent:_____ Date_____

Counselor Signature:/s/ George Dyer Date_____

APPENDIX H

STATE OF CALIFORNIA DEPARTMENT OF REHABILITATION RETRAINING CONTRACT FOR PAUL ENRIGHT [C.A. ER 176-178]

DEPARTMENT OF REHABILITATIONN
DR 228 (Rev. 12/85) Computer Generated

Name - ENRIGHT, PAUL

CLIENT CASE NOTES

DATE		REMARKS
03/06/2000	#11	IPE

Assessment of Needs:
Mr Enrights a 42 y/o male who is eligible for department's services based MIOR, intake, and Medical review which verifies Dx of multiple chemical sensitivity which causes severe miagraine headaches that impedes his balance, coordination, concentration and focus thus contraindicating his return to his previous employment as an Electronic Technician. Mr Enright received his Associates Degree in Electronic Technology from Cuyamaca College. He last worked in as a QTT at Solar Turbine 01/27/99. He was placed on medical layoff because employer could not guarantee there would be no exposure to chemical/fumes in his work enviornment. Applied workers compensation which has been denied. He has recently applied for UI benefits an awaiting decision. To re-enter the competetive labor market he will need to be retrained in a field that will accomodate his impairment/impediments.

Employment Outcome:Through informed choice Mr Enright has elected to train at ColeMan College

(private institution) to receive a BS in Computer Science for a career path as a programmer. RC has discussed with Mr. Enright that San Diego State University is sufficient to meet his needs for a BS in computer science therefore the overall cost to the Department will be equal to or less than the costs of a public school. Therefore Mr. Enright will be responsible for the additional costs of electing to train in a private college vs.training in a public institution.

According to Lawrence Clinger (SDSU Advisor) and RC review of SDSU Catalog Mr Enright will need approximately 56 lower division units and 46 upper division units to acquire a BS degree with emphasis in Programming. Client understands that the cost of community college is $11 per unit plus parking, books and supplies, and that these figures will be used to calculate DR contribution to Private school and the SDSU fees will be used to calculate the remaining 46 upper division units to include parking, books and supplies.

Community college 56 units @ $11 per=$616.00. Estimated semesters (4) Books/supplies $225.00 per semester, parking $20.00 per semester = $616.00 (BOGG) + $225.00 (4) + $20.00(4)= $1596. Due to client's finiancial need he would be eligible for Pell/Bogg grant. The Pell will be utilized by Client to assist with living expenses which is essential to the success of his IPE.

DR contribution to private school minus the BOGG= $1596.00 - $616= $980.00.

SDSU cost for 12 units per semester$886.00
@ 4 semesters=$3544.00
Books/supples $300.00 @ 4 semesters=$1200
Parking $96.00 @ 4 semesters=$384.00

Private institution (Coleman college) will cost approximately $18,090.00 and will be completed by 09/30/2001.

According to EDD labor market survey the above career is expected to continue it growth.

Intermediate Objective: Mr. Enright will attend Coleman College beginning 03/11/00 thru 09/30/01 to obtain a BS degree in Computer Science with an emphasis in programming. After successful completion of training client will work with the career services aid at coleman college for placement assistance. It is anticipiated that client will be employed by 12/30/01 or before.
CLIENT RESPONSIBILITIES:
Client must provide grades at the end of each module before to permit RC to authorize payment to Coleman college.
Contact counselor of any absence from job club or training.
Client will attend training on a full time basis unless prior approval is obtained from counselor.
Report any change in address, phone number, financial, and all concerns or problems that may have an adverse impact on the rehabilitation process.
Client will return all transportation claims within 10 days of receipt.
REHABILITATION COUNSELOR-Agree to provide the necessary services within the scope of Department of Rehabilitation rules and regulations to empower client to be gainfully employed by 12/30/01.

CLIENT FINIANCIAL PARTICIPATION: $11952.00.

Post employment and Rehab technology services are not anticipiated.

Action:Coleman College works in modules. It will take 11 modules for clent to complete B/S degree emphasis in programming. DR financial contribution per module will be calculated as follows:
TOTAL DR contribution $6108.00 divided by 11 modules= $555.27 to be paid monthly after successful completion of each module and upon receipt of monthly progress report from training institution.
Services to be Provided:
l)Counseling and Guidance-duration of case.

To:Coleman College ATTENTION: Elaine Cahill
7380 Parkway Dr.
La Mesa, CA 91942-1500
Beg 03/11/00 to 04/14/00 completion of 1st module=$555.28 04/17/00 to 05/19/00=$555.28
05/20/00 to 06/23/00=$555.28
06/26/00 to 07/28/00=$555.27
08/05/00 to 09/08/00=$555.27
09/11/00 to 10/13/00=555.27
10/14/00 to 11/17/00=$555.27
01/06/01 to03/16/01=$555.27
03/17/01 to 05/25/01=$555.27
05/26/01 to 08/03/01=$555.27 see case following casenote for continuation of IPE.

LAST ENTRY BY GDYER

DATE REMARKS

03/06/2000 #12 IPE CONTINUE FROM CASENOTE #11

08/04/01 to 09/30/01$555.27

The total cost of the BS with emphasis in programmingis $23.400.00 if starting from the beg.Client,s transcrips has been evaluated and will

require only 44.5 units to complete BA degree=44.5 x $140 per unit=$6230.00plus $11.760 for core plus $100.00 registration=18090.00

DR contribution $6108.00

Client will need to use private transportation due to his impairment/impediment. He will be traveling 20 mi per day 5 day per wk totals 100 x 4wks=400 mi mo. Auth averages 20 mpg gas 1.68 ga=$33.60 per month

Beg 03/13/00 thru03/31/00=$25.20
Beg 04/01/00 thru 11/30/00=$33.60 per mo
SB=none

RC has discussed payment with Client, Elizabeth Galindo (financial services) with the understanding that DR226 Report of Progress In Training) must be attached to authorization before funds or distributed.

/s/ Paul Enright Paul Enright

/s/ George Dyer RC George Dyer

/s/ Nelson Wright RS Nelson Wright

LAST ENTRY BY GDYER

APPENDIX I

MARK REMAS' VOCATIONAL EVALUATION REPORT OF PAUL ENRIGHT [C.A. ER 203-207]
(Full Report With All Exhibits C.A. ER 203-469)

THE REMAS GROUP

September 23, 2000

Mr. Paul Enright
1194 Greenfield Dr.
El Cajon, CA 92021

RE: Paul Enright
Emp: Solar Turbines
Case: SDO 0253905

VOCATIONAL EVALUATION REPORT

PURPOSE:

Mr. Enright, a private party, retained this counselor to review medical records and labor market information to determine whether he is restricted from segments of the labor market and, if so, to what extent. Mr. Enright has provided a variety of medical reports, published articles, work environment analysis data, and has attended interviews with this counselor

METHOD:

Mr. Enright presented data reports drawn from the 0*NET Dictionary. This information is arranged in Excel data base spreadsheets to demonstrate the occupational requirements associated with each job classification in the 0*NET. Occupational requirements are requirements for strength, posture,

mobility, nonexertional demands, as well as environmental exposure. This information was reviewed and independently replicated by this counselor to determine the validity of sorting job classifications based on medical restrictions.

The medical reports were reviewed and utilized to assess the diagnosis and restrictions that are applicable in this case.

SUMMARY

Dr. Donald Dalessio service report of 01/06/99 identified, "Headache with migrainous features, associated with sensitivity to odors."

Dr. Dalessio continues to note that odors and aromas may precipitate headaches. On the basis of the research literature and examination of Mr. Enright, the doctor recommended the removal of Mr. Enright from the areas of exposure. He states, "I believe that the patient is disabled related to multiple chemical sensitivity-producing headaches as I have outlined."

[(RE: Paul Enright 09/25/00 Page 2)]

The cause of headaches is associated with the exposure at work according to Dr. Kilburn, USC School of Medicine in his Supplement to report of April 19, 1999 statement.

Mr. Enright has filed a claim for Worker's Compensation benefits. He is pursuing an award as a result of contracting multiple chemical sensitivity from the industrial exposure to fumes during his employment with Solar Turbines.

In his claim for Worker's Compensation benefits, Mr. Enright reviewed the method of rating his medical

condition. In an effort to quantify his disability for rating purposes, Mr. Enright conducted an independent analysis of chemical exposure in industry. He utilized the resources available through the relatively new source, O*NET. This compendium was prepared by the U.S. Department of Labor and extends the information contained in the traditional labor references, The Dictionary of Occupational Titles (DOT), Occupational Employment Survey (OES) and the Guide to Occupational Exploration (GOE). The specific characteristics for each job were rated and quantified and include exertion, postural, and environmental demands. The information is available in a series of tables available through the O*NET internet site. The Data Dictionary provides an explanation and rating method for each job characteristic.

Mr. Enright successfully downloaded the information and incorporated it in a comprehensive list matching the O*NET code number to the OES number. The OES number allows comparison of job titles to US Census information resulting in a quantification of jobs for each distinctive job title.

The category for environmental contaminants was identified and charted. Exposure was designated in severity by a numerical value. In addition, jobs were classified based on indoor/outdoor work demands, consideration being given to exposure to exhaust.

Once the data were sorted the number of jobs that have excessive exposure to fumes, exhaust, or other contaminants that are injurious to Mr. Enright were painstakingly tabulated. The results indicated preclusion from approximately 29 of all jobs listed in the Dictionary of Occupational Titles.

CONCLUSIONS:

The USC School of Medicine is a nationally recognized medical facility and the evaluation by Dr. Kilburn is credible. Pursuant to the medical records provided, the condition of multiple chemical sensitivity has been diagnosed after extensive testing.

The physician notes that Mr. Enright's condition included industrial exposure and he attributed causation to his employment at Solar Turbines.

[(RE: Paul Enright 09/25/00 Page 3)]

The issue of degree of disability as a result of multiple chemical sensitivity has been evaluated by use of available government data for occupations and census.

The use of O*NET data in relation to the precluded job characteristics was accurately developed and represents a reasonable estimate of the reduction in available occupations specific to Mr. Enright.

The method employed for evaluating the occupational information was reviewed and replicated in kind. Thus, the restriction equaling 29% of jobs appears to be a valid degree of permanent disability.

Respectfully submitted,

/s/ Mark Remas
Mark Remas, M.A., C.R.C.
Vocational Consultant

cc: Paul Enright
File

[(RE: Paul Enright 09/25/00 Page 4)]

RE: Paul Enright

WCAB#: SDO 0253905

I, Mark Remas, M.A., C.R.C. declare and state:

1. My name is Mark Remas, and I am a certified vocational rehabilitation counselor,

2. I am the owner of a vocational rehabilitation counseling firm and function as the senior counselor and supervisor in addition to my personal work activity as a certified vocational rehabilitation counselor.

3. I have been certified (as of 1989) as a rehabilitation counselor by the National Commission on Rehabilitation Counselors. I have also been designated as a vocational expert for the Social Security Administration, Department of Hearings and Appeals.

4. My current practice consists of providing vocational rehabilitation services to injured workers under the California Labor Code 139.5 which includes preparation of job descriptions and job analyses as well as vocational exploration and job placement assistance. Other duties include preparation of labor market surveys, coordinating and commenting on residual functional capacity, wage earning capacity studies, personal injury litigation, and testimony for the Social Security Administration, Department of Hearings and Appeals.

5. The preparation of a job analysis requires visual inspection of the job site, and visual observation of the performance of a particular job, and requires an outline of the job requirements, physical demands, job tasks and responsibilities, and equipment and work aids that are used on the job.

Preparation of a job analysis also requires quantification of the specific requirements during the day of lifting, stooping, bending, carrying, etc. as well as the particular weights that are lifted and carried at work during the day;

6. I have been preparing labor market surveys in San Diego since 1982;

7. I consider myself to be a vocational expert on the San Diego labor market. That is based in part on my years of experience and the time I have spend in San Diego contacting and talking to

[(RE: Paul Enright 09/25/00 Page 5)]

employees and employers, determining labor market needs and wages, preparing job analyses and position descriptions for specific jobs, and assisting injured workers in returning to suitable gainful employment;

8. I have previously testified as a vocational expert in Social Security Administration hearings, Workers' Compensation Appeals Board actions, Department of Labor actions, dissolution proceedings and personal injury litigation;

9. I personally interviewed Mr. Enright and evaluated the information he provided including medical reports, and data derived from the 0*NET and other US government resources.

10. 1 replicated the study steps taken by Mr. Enright and concur with the evaluation of degree of disability of 29 of all occupations based on quantification of medical restrictions as a result of multiple chemical sensitivity.

Signed: /s/ Mark Remas 9/25/00

Mark Remas, M.A., C.R.C. Date

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Supreme Court, U.S.
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No. 02-1157

In The

Supreme Court of the United States

PAUL ENRIGHT,

Petitioner,

v.

SOLAR TURBINES INCORPORATED,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Whether this Court wishes to grant a petition for writ of certiorari in the instance of a factual finding by the district court that Petitioner had failed to meet his burden of proof, that a sufficient number of jobs were foreclosed from him, to meet the criteria under the Americans with Disabilities Act, 42 U.S.C. § 12101 et seq.

2. Whether this Court wishes to consider whether the district court properly excluded a declaration of an expert witness proferred by Petitioner based on a finding that the opinions expressed therein lacked the proper foundation.

3. Whether this Court wishes to consider whether the district court should have admitted into evidence an arbitrator's decision, along with its findings and conclusions.

LIST OF PARTIES

All parties appear in the caption. S. Ct. 24.1(b).

CORPORATE DISCLOSURE

The parent corporation of Solar Turbines Incorporated is Caterpillar, Inc. and is a wholly owned subsidiary of Caterpillar, Inc.

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PRELIMINARY STATEMENT

This Court exercises its discretion to grant a petition for writ of certiorari only when motivated by "compelling reasons." S. Ct. Rule 10. This Petition for Writ of Certiorari attempts to elevate a prosaic Ninth Circuit opinion that is of no interest to anyone except the parties involved. It does not unsettle or create any conflict of law, it does not ignore the supremacy of federal jurisprudence and it does not serve as citable precedent for parties outside the confines of the dispute. Rather, and despite Petitioner's efforts to cloak the lower courts' decisions as precedential, this dispute is largely based on Petitioner's failure to adduce material, relevant, and admissible evidence at the district court level to support his claims. At best, and placed within the rubric of S. Ct. Rule 10, the Petition merely asserts erroneous factual findings and the contended misapplication of a properly stated rule of law. The Ninth Circuit's unpublished, two-page opinion did little more than uphold the ruling of the district court. Contrary to Petitioner's assertion, it is not in conflict with other Circuits, nor is there anything noteworthy.

COUNTERSTATEMENT OF THE CASE

The first question Petitioner presents is whether the EEOC's Interpretative Guidelines, as set forth in the Code of Federal Regulations, regarding the definition of disability under the Americans with Disabilities Act was followed and properly applied. Petitioner asserts that it was not, but the record does not support this. Contrary to Petitioner's assertions, the district court expressly considered the EEOC's Interpretative Guidelines, but determined

that Petitioner had failed to adduce admissible evidence to meet his prima facie case.

The second question Petitioner presents is whether the district court, under Rule 702 of the Federal Rules of Evidence, properly excluded certain expert testimony in support of Petitioner's claims. According to the record, the trial excluded the expert's proffered testimony, for, among other reasons, the lack of a proper foundation. Admissibility of expert testimony is well within the discretion of the district court and generally not something that concerns this Court. Going further, however, the district court found that the expert's opinion *in toto* did not carry Petitioner's burden of proof.

The third and final question Petitioner presents is whether the district court should have considered an arbitrator's "decision" and whether the arbitrator exceeded his authority. Here, Petitioner overstates the importance of the role of the arbitrator at the district court level. The district court admitted into evidence the findings and conclusions of the arbitrator, but the record does not reflect how much weight it was accorded. Regardless of the arbitrator's decision, the district court concluded *on its own* that Petitioner simply had failed in his burden of proof.

A. Cloaked In The Guise Of Championing The EEOC Interpretative Guidelines, The Petition Does Little More Than Quibble With The District Court's Assessment Of The Merits Of Petitioner's Case.

Petitioner would have this Court view his case as a vehicle to resolve an open question surrounding what

constitutes a "disability" under the Americans with Disabilities Act, 42 U.S.C. § 12102 et seq., based on the guidelines put forth by the EEOC. This case is not the proper vehicle for that determination. The Ninth Circuit, for example, seemingly accepts the EEOC's regulatory guidelines (see *Thornton v. McClatchy Newspapers, Inc.*, 261 F.3d 789, *clarified,* 292 F.3d 1045 (9th Cir. 2002)), and the district court operated under the same assumption. (Pet. 11a-12a) Indeed, citing 29 C.F.R. § 1630.2(j)(3)(i), the district court's approach echoed the very EEOC guidelines which Petitioner now asks this Court to impose. (Pet. 16-17 and 12a) Boiled down to its essence, Petitioner merely disagrees with the district court's resolution of the evidence presented, and its admissibility, and asks this Court to make a contrary determination. That is not this Court's function. S. Ct. 10.

Petitioner concedes that under the ADA an impairment must "substantially limit" an individual's ability to work. (Pet. 20) Finding, as the district court must, that the scope and breadth of the impairment span many jobs and not just one, and while acknowledging, without rejection, the same Petitioner assertions made here (Pet. 11a-12a), the district court examined the evidence adduced by Petitioner and found it lacking. Specifically, the district court found the Petitioner had failed to establish that his impairment was "substantially limiting," a requirement under the regulations. 29 C.F.R. § 1630.2(j)(3)(i).

For example, the district court found Dr. Hoagland's letter too "conclusory" to support a claim of "substantial limitations." (Pet. 12a) The district court found Dr. Dalessio's letter inconclusive (Pet. 12a-13a) and Dr. Kilburn's testimony as not sufficiently probative on the issue of the scope and breadth of the asserted disability. (Pet. 13a)

Discussed below, the district court also found that Mr. Remas' opinion was not sufficiently probative and lacked a proper foundation. (Pet. 13a-14a) And, finally, the district court found that the determination from the State of California Department of Rehabilitation was not sufficiently clear and did not adequately address the issue under federal law to be determinative.

In short, the district court found that Petitioner had failed to meet the essential elements of his prima facie case that a wide scope of jobs were unavailable to him, elements that Petitioner seems to concede were applicable. For that reason, instead of presenting this Court with an instance where proper interpretation of the ADA is warranted, Petitioner merely argues that the district court should have weighed the evidence differently.

B. The Admissibility Of Expert Testimony Is Discretionary With The District Court And Reviewed Under The Abuse Of Discretion Standard.

From the outset, Petitioner misstates the nature of the district court's ruling concerning the vocational rehabilitation expert. (Pet. 21-24) The district court ruled that the expert, Mr. Remas, lacked the appropriate foundation upon which to base his opinion under Fed. R. Evid. 702, and failed to properly and to completely address the scope of the effect of Petitioner's disability. (Pet. 13a-14a) The Ninth Circuit upheld the district court's ruling on the admissibility of evidence. (Pet. 4a) Whether the inadmissibility of Mr. Remas' declaration affected the district court's decision – if at all – is unclear but it is clear that the district court felt the Petitioner's adduced evidence, and Mr. Remas' declaration, fell woefully short of the mark.

The admissibility of evidence is well within the sound discretion of the district court. *Hamling v. United States,* 418 U.S. 87, 127, 94 S. Ct. 2887, 2912, 42 L. Ed. 2d 129 (1974); *United States v. Bowers,* 534 F.2d 186, 193, n.7 (9th Cir.), *cert. denied,* 429 U.S. 942, 97 S. Ct. 360, 50 L. Ed. 2d 311 (1976); *United States v. Systems Architects, Inc.,* 757 F.2d 373, 377 (1st Cir.), *cert. denied,* 474 U.S. 847, 106 S.Ct 139, 88 L. Ed. 2d 115 (1985); *Roback v. V.I.P. Transp. Inc.,* 90 F.3d 1207, 1215 (7th Cir. 1996). The discretion accorded the district courts is particularly germane here since the determination of whether a person is disabled under ADA is an individualized inquiry. *Sutton v. United Air Lines, Inc.,* 527 U.S. 471, 483, 119 S. Ct. 2139, 144 L. Ed. 2d 450 (1999); *Thornton v. McClatchy Newspapers, Inc., supra,* 261 F.3d at 794.

This Court has already addressed this issue now in three separate opinions. They are: *Kumho Tire Co. v. Carmichael,* 526 U.S. 137, 119 S. Ct. 1167, 143 L. Ed. 2d 238 (1999); *General Electric Co. v. Joiner,* 522 U.S. 136, 118 S. Ct. 512, 139 L. Ed. 2d 508 (1997); *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 238 (1993). The landmark case of *Daubert*, provides the analytical framework for determining the admissibility of expert testimony under Rule 702. Within that standard, the district court acts as a "gatekeeper" to exclude expert testimony that is irrelevant or does not result from the application of reliable methodologies or theories to the facts of the case. *Id.* at 589-92. In *Daubert*, this Court set forth a non-exclusive list of factors that district courts may use in evaluating expert testimony. *Id.* at 593-94. When presented with the issue again in *Kumho Tire Co.*, this Court emphasized that the *Daubert* inquiry is "a flexible one" and that the analysis will depend on the

nature of the issue, the witness's expertise, and the subject of the testimony. This Court also explained that the principles of *Daubert* applied not only to scientific testimony, but to all expert testimony. *Id.* at 149.

In keeping with that, in 2000, Congress amended Fed. R. Evid. 702 so that it now provides that an expert witness with "scientific, technical, or other specialized knowledge" may testify in the form of an opinion "if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case." Fed. R. Evid. 702 advisory committee's notes. As amended, Rule 702 does not distinguish between scientific and other forms of expert testimony.

Based on the foregoing, there is nothing about the district court's ruling on the admissibility of the Remas' declaration that merits this Court's attention.

C. Contrary To The Petition's Assertions, The Arbitrator Had The Authority To Make Findings And Conclusions Regarding Petitioner's Disability And The District Court Had The Authority To Consider It, But What Weight It Carried Is Unclear.

Here, too, Petitioner overstates his case. The district court addresses the arbitrator's findings and conclusions in one paragraph finding that Petitioner's due process was fully satisfied after "a full and fair hearing." (Pet. 10a) Finding that the arbitrator's decision contained a "thorough factual and legal analysis," the district court admitted it into evidence. *Id.*

Petitioner asserts two claims, to wit, that the arbitrator was not impartial and went beyond the scope of his authority.

The purported bias stems solely from the arbitrator's selection by Respondent and the Petitioner's union. (Pet. 24) There is no record, however, that Petitioner did not participate in the selection process. Suggesting just the opposite conclusion, it is clear from the record that the arbitration was formed out of the collective bargaining process between Respondent and Petitioner's union and that he was adequately represented by the union at the time of the arbitration hearing. (Pet. 20a) There is no record that the arbitrator acted with bias. Indeed, the district court found just the opposite. (Pet. 10a)

In addition, there is no record that if the arbitrator exceeded the scope of the submission, the district court considered it. (Pet. 10a) The arbitrator made a specific finding that under the collective bargaining agreement, disability was an issue expressly falling with the arbitrator's jurisdiction. The case cited by Petitioner, *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 94 S. Ct. 1011, 39 L. Ed. 2d 147 (1974), is inapposite. Therein, Justice Powell writing for the Court held that an employee subject to a collective bargaining agreement, that includes an arbitration provision, does not waive thereby access to the courts to seek redress for a statutory violation.[1] In so holding, this Court further noted that "[i]f an arbitral decision is based *'solely* upon the arbitrator's view of the

[1] In *Alexander*, the violation involved Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, et seq.

requirements of enacted legislation,' rather than on an interpretation of the collective-bargaining agreement, the arbitrator has 'exceeded the scope of the submission,' and the award will not be enforced." [Emphasis added.] *Id.* at 53, 1022. That did not occur here. The arbitrator made it clear there was a nexus between the contractual issues and the statutory provisions on disability/discrimination. (Pet. 21a) It is for this reason that the arbitrator ruled on the question of disability. *Alexander* does not preclude this.

In addition, and suggesting strongly that the district court did not rely exclusively on the arbitrator's decision, the ruling by the arbitrator is distinctly different in scope than the district court's. The arbitrator focused exclusively on the scope of available work at Solar and whether Solar discriminated against him by not accommodating him with another position. (Pet. 25a-30a) The district court, on the other hand, focused on whether Petitioner's medical sensitivity to fumes amounted to a physical impairment that restricted him from a "class of jobs." (Pet. 11a-12a) The district court considered the issue *de novo*, and, quite differently from the arbitrator, ruled that Petitioner had failed to meet his burden of proof that he was unable to perform a "class of jobs or a broad range of jobs in various classes." 42 C.F.R. § 1630.2(j)(3)(i). (Pet. 34a)

CONCLUSION

The two-page unpublished opinion of the Ninth Circuit correctly upheld the district court. No factors should motivate this Court to exercise discretion to address this case which poses no legal conflict or important public policy issues. This matter simply fails to present the

sort of substantial legal question(s) deserving of review by the highest court in the land. With an arbitration, lawsuit in the district court, appeal to the Ninth Circuit Court of Appeals, the parties and judicial system already have invested far more resources examining the extent of Petitioner's alleged physical condition than should have been incurred. This petition for writ of certiorari should be denied.

Respectfully submitted,

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Supreme Court, U.S.
FILED
MAR 17 2003
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No. 02-1157

IN THE

SUPREME COURT OF THE UNITED STATES

PAUL ENRIGHT,

Petitioner,

v.

SOLAR TURBINES INCORPORATED,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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REPLY BRIEF FOR PETITIONER

The petition presents three questions of substantial importance to the developing law under the ADA and the protection of disabled individuals in the workplace. The first is whether the EEOC Interpretive Guidance on the *Definition of the Term "Disability"* February 2000, is valid and should be followed in determining if an individual is substantially limited in the ability to engage in work under the ADA. The second is whether the Federal Rule of Evidence 702 was properly applied in considering the admittance and evaluation of expert testimony. This expert testimony would have assisted in the determination of whether Petitioner's impairment constitutes a disability under the ADA. The Ninth Circuit held that Enright's vocational rehabilitation counselor did not qualify as an expert witness, despite the fact that he had previously testified as a vocational expert. The third question is whether an arbitrator's decision under a Collective Bargaining Agreement is admissible evidence in an ADA case, where the arbitrator exceeded the scope of submission by ruling on Petitioner's federal statutory rights under the ADA, and where the arbitrator was not an impartial decisionmaker because he was exclusively chosen by Petitioner's adversaries.

Respondent Solar Turbines attempts to restate the above questions in order to confuse and minimize their importance, and then concludes that they are of no interest to anyone except the parties involved. *See* Brief in Opposition (Opp.) i & 1-2. Petitioner contends that the questions presented are of substantial importance to disabled individuals in the workplace. Without Supreme Court intervention lower courts can apply arbitrary standard in determining whether an individual is substantially limited in the ability to

work and disabled individuals will not receive the intended protections afforded by the ADA.

Therefore, Supreme Court intervention is needed to set clear consistent standards and guidelines for determining whether an individual is substantially limited in the ability to work. Additionally, this Court should grant review to resolve the misapplication of the Federal Rule of Evidence 702 and clarify the standards by which it is applied in an ADA case. Finally, intervention by the Supreme Court is necessary to resolve the direct conflict with the Supreme Court's decisions in *Teachers v. Hudson*, 475 U.S. 292, 307–308 (1986) and *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 53-54 (1974). These conflicts were created when the Ninth Circuit held that the district court did not err by considering the arbitrator's decision. This ruling conflicts with the above Supreme Court decisions because the arbitrator exceeded the scope of submission by ruling on Petitioner's federal statutory rights under the ADA, and because the arbitrator was not an impartial decisionmaker due to the fact he was exclusively chosen by Petitioner's adversaries.

I. INTERVENTION BY THE SUPREME COURT IS NEEDED TO CLARIFY THE STANDARDS AND GUIDELINES FOR DETERMINING WHETHER AN INDIVIDUAL IS SUBSTANTIALLY LIMITED IN THE ABILITY TO WORK

The Ninth Circuit panel held that, "Enright's letters from examining physicians and occupational rehabilitation and retraining records show some level of impairment, but they do not show a substantial limitation on his ability to engage in work." Pet. App. 4a. This decision by the panel is contrary to the EEOC's interpretive guidance presented in its

Compliance Manual under Section 902 *Definition of the Term "Disability"* which was last modified February 1, 2000. Pet. App. 35a-45a. If this EEOC interpretive guidance had been properly considered the panel would have concluded that Enright is substantially limited in his ability to work. *See* Pet. 14-21.

Solar Turbines concedes that there is an "open question surrounding what constitutes a 'disability' under the Americans with Disabilities Act, 42 U.S.C. § 12102 et seq., based on the guidelines put forth by the EEOC." Opp. 2-3. Then Solar Turbines states that, "The Ninth Circuit, for example, seemingly accepts the EEOC's regulatory guidelines (see *Thornton v. McClatchy Newspapers, Inc.*, 261 F.3d 789, *clarified*, 292 F.3d 1045 (9th Cir. 2002)) ...". Opp. 3. This is precisely the problem; it is unclear what standards the Ninth Circuit Court uses to determine whether an individual is disabled under the ADA. The lower courts do not have clear standards and guidelines by which to determine whether an individual is substantially limited in their ability to work. Therefore, this Court should grant review to clarify the standards and guidelines for determining whether an individual's impairment substantially limits their ability to work.

II. SUPREME COURT REVIEW IS NECESSARY TO CLARIFY THE STANDARDS BY WHICH THE FEDERAL RULE OF EVIDENCE 702 IS TO BE APPLIED IN ADA CASES

Solar Turbines attempts to suggest that the only issue regarding Mark Remas' vocational evaluation report is the discretionary admissibility of expert testimony. Opp. 4-6. Petitioner contends that the key issue is whether Mark Remas qualifies as an expert witness under Federal Rule of Evidence 702. The Ninth Circuit held that, "Enright's vocational

rehabilitation counselor did not qualify as an expert witness under Federal Rule of Evidence 702." Pet. App. 4a. This decision overlooked the numerous qualifications of Mark Remas and the fact that he had "previously testified as a vocational expert in Social Security Administration hearings, Workers' Compensation Appeals Board actions, Department of Labor actions, dissolution proceedings and personal injury litigation; . . ." Pet. App. 69a-70a; Pet. 21-24. Additionally, the district court was exceptionally critical of Mark Remas' report, and concluded his "evaluation is insufficient to raise a genuine issue of material fact regarding whether Plaintiff is substantially impaired from working in a broad class of jobs." Pet. App. 13a-14a. The district court reached this decision despite the fact that Mark Remas' report concluded Petitioner had a "degree of disability of 29% of all occupations based on quantification of medical restrictions as a result of multiple chemical sensitivity". (Pet. App. 70a; see Pet. 24).

The above decision by the district court is contrary to the EEOC's interpretive guidance. The EEOC offers the following interpretive guidance under Section 902 *Definition of the Term "Disability"* for evaluating evidence in determining whether an impairment substantially limits an individual's ability to work:

> "The reference to the "number and types" of jobs is not meant to require an onerous evidentiary showing. 29 C.F.R. pt. 1630 app. § 1630.2(j). The reference does not mean that an individual must identify the exact number of jobs using similar or dissimilar skills in a certain geographic area. Further, the reference does not mean that an individual must count positions or otherwise present a precise number of jobs from which (s)he is disqualified because of an impairment. Instead,

> the reference to the "number and types" of jobs "only require(s) the presentation of evidence of general employment demographics and/or of recognized occupational classifications that indicate the approximate number of jobs (e.g., 'few,' 'many,' 'most') from which an individual would be excluded because of an impairment." Id. Furthermore, in cases where it is clear that an individual is excluded from a class of jobs or a broad range of jobs in various classes, only minimal evidence will be required." Pet. App. 43a.

If the district court had used the above EEOC interpretive guidance, they would have concluded that Mark Remas' report meets these standards and is sufficient to raise a genuine issue of material fact as to whether Petitioner was substantially impaired from working in a broad class of jobs.

Therefore, this Court should grant review to resolve this misapplication of the Federal Rule of Evidence 702 and clarify the standards by which this rule is to be applied in the evaluation of evidence in ADA cases. Without Supreme Court intervention the lower courts can apply arbitrary standards and disabled individuals will not receive the intended protections afforded by the ADA.

III. SUPREME COURT REVIEW IS NEEDED TO RESOLVE THE DIRECT CONFLICTS WITH SUPREME COURT DECISIONS CREATED BY THE NINTH CIRCUIT'S RULING ALLOWING CONSIDERATION OF THE ARBITRATION DECISION

Solar Turbines states, "Petitioner asserts two claims, to wit, that the arbitrator was not impartial and went beyond the scope of his authority." ... "There

is no record, however, that Petitioner did not participate in the selection process." Opp. 7. Solar Turbines errs in contending that there is no record that Petitioner did not participate in the selection process. Petitioner, Paul Enright, in his sworn declaration states,

> "This arbitrator was chosen by Solar Turbines and Local Lodge 389 attorney David Rosenfeld. At the time that I was notified of the arbitration by David Rosenfeld in his letter of October 20, 2000, I had already filed suit against both Solar Turbines and Local Lodge 389. I had no input into the choosing of the arbitrator and contest the fact that he was an impartial arbitrator as stated by the Defendant." (C.A. ER 160; Pet. 8).

Therefore, the Ninth Circuit's decision to allow consideration of the arbitrator's decision conflicts with the Supreme Court decision in *Teachers v. Hudson*, 475 U.S. at 307-308 (1986). In *Teachers* the Court held that because the union had unrestricted choice of arbitrators from a state list the arbitrator was not an impartial decisionmaker for resolving conflicts between the union and its nonmembers. Based on this Supreme Court decision the arbitrator in Enright's case, who was exclusively chosen by his joint adversaries, was not an impartial decisionmaker. Thus, the Ninth Circuit should not have allowed consideration of the arbitrator's decision and review by this Court should be granted to resolve this conflict.

Solar Turbines submits that, "The arbitrator made it clear there was a nexus between the contractual issues and the statutory provisions on disability/discrimination. (Pet. 21a) It is for this reason the arbitrator ruled on the question of

disability. *Alexander* does not preclude this." Opp. 8. [*Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 53-54 (1974)]. Petitioner contends that *Alexander* specifically precludes the arbitrator under a collective bargaining agreement from ruling on Petitioner's federal statutory rights, even if certain contractual rights are similar to, or duplicative of those federal statutory rights. The Court in *Alexander* held as follows:

> "[i]f an arbitral decision is based 'solely upon the arbitrator's view of the requirements of enacted legislation,' rather than on an interpretation of the collective-bargaining agreement, the arbitrator has 'exceeded the scope of submission,' and the award will not be enforced. Thus, the arbitrator has authority to resolve *only questions of contractual rights,* and this authority remains regardless of whether certain contractual rights are similar to, or duplicative of, the substantive rights secured by [the federal statute] Title VII." *Alexander* at 53-54, (emphasis added) (citation omitted) (quoting *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597 (1960)].

Therefore, since the arbitrator ruled on Enright's federal statutory rights the arbitrator's decision should not be enforced and should not have been considered by the district court. Thus, the Ninth Circuit's decision to allow consideration of the arbitrator's decision is in direct conflict the Supreme Court's decision in *Alexander*. The Supreme Court should grant review to resolve this conflict.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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